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ABSTRACT

This kit, the first of four learning circles on civics and citizenship, addresses a series of broad issues about the way in which Australia is governed. Introductory materials include a synopsis of the six sessions; lists of 51 references, 29 Internet sites, and 13 videos and CDs; glossary; and list of 19 resource materials. Session guides are provided for six sessions: Our Group--Our Government; The Australian Constitution: Basis for Stability or Constraint to Change; Parliament--The Legislative Branch of Government; The Executive Government: Representative Leaders or Elected Dictators?; The High Court of Australia; and An Australian Republic? Components of each session guide include some or all of the following: an introduction that outlines the objective and aims; lists of suggested activities in the session; background documents provided; list of resources; suggested activities with discussion; optional extra activities; case studies highlighted in block format; and the background documents. (YLB)

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Introduction

THE GOVERNANCE OF *Australia*

Civics and Citizenship Learning Circle Kit
developed by
Adult Learning Australia Inc.
2001

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Organisations supplying resource materials

Australian Electoral Commission

Constitutional Centenary Foundation

Department of Prime Minister and Cabinet

The High Court of Australia

Parliamentary Education Office

• The Discovering Democracy Programme

Exerpt from a Ministerial Statement by the Hon Dr David Kemp MP, then Minister for Schools, Vocational Education and Training, 8 May 1997.

*As Australia approaches the centenary of Federation, and the Constitutional Convention to be held later this year, the Government is pleased to announce a national programme of Civics and Citizenship Education activities—
Discovering Democracy.*

The Government is committed to ensuring that all students have opportunities to learn about the system of government in Australia.

Over the next four years, the Government has allocated \$17.5 million to raise the levels of civic knowledge of students through the Civics and Citizenship Education programme, which will involve the four sectors of education—schools, higher education, vocational education and training, and adult and community education.

The four themes of the programme, which was extended to 2004 with an additional \$13.4m funding in the 2000–2001 Budget, are:

- Who Rules?
- Law and Rights
- The Australian Nation; and
- Citizens and Public Life.

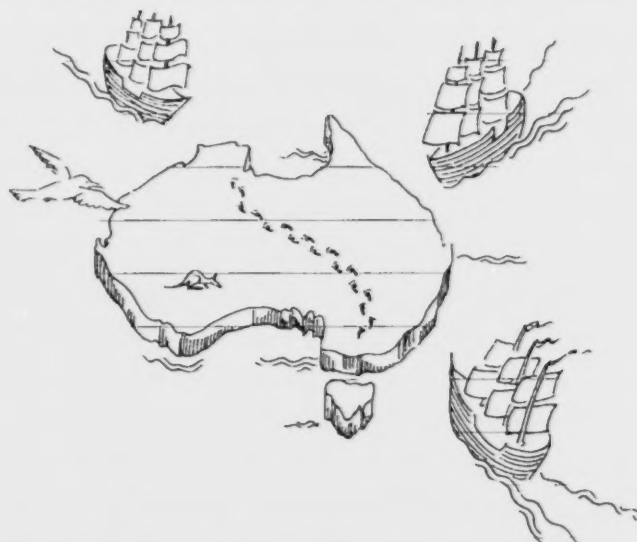
Australia's democratic tradition

We are the heirs of one of the most remarkable democratic initiatives of the nineteenth century. Just after 1850, hundreds of thousands of people began to pour into this country in the great gold

rushes. Among them were many who were frustrated at the slow development of democracy in Britain and who were determined to establish a new fully democratic society in their new land. They joined with and gave momentum to those already pushing towards representative institutions of government.

Australia provided these people with unique opportunities to translate their reforming spirit and egalitarian principles into the democratic framework we enjoy today. Realising that democracy required educated citizens and a moral and ethical society they not only looked for gold, but also built schools, churches and universities.

An impressive record in democratic and social progress began: Australia was one of the first countries in the world to abolish the property requirement for voting for the popular assembly, to give first all men and later all women the vote, to pay salaries to members of Parliament (so that those without independent incomes could seek office), to provide public education and old age



pensions, to introduce the eight-hour day, and to establish the secret ballot—known throughout the world as the Australian ballot—so that everyone could cast their vote free from intimidation. By the second half of last century, Australia had some of the most radically democratic political institutions in the world.

Effective democracy is not a static, inflexible concept, but a dynamic, active principle that needs to be continuously cultivated, adapted and revitalised.

In this century 100,000 Australians sacrificed their lives to defend their democratic way of life against militarism and totalitarianism—and to help other nations defend their democracy.

The new democracy came at a cost that today is being fully revealed—the dispossession of the indigenous people. It has been the democratic idea that has forced the recognition that this dispossession has consequences for all Australians. It has been the evolution of the belief that all people have equal rights, are entitled to equality before the law, and have equal responsibilities that dominates our response to the legacy of this dispossession today.

We have, after long debate, accepted that if people are equal, regardless of their background or beliefs, Australia as a democracy cannot have anything other than a non-discriminatory immigration policy. If everyone has equal rights, we cannot have one set of laws for men and another for women. In a democratic Australia there is no place for discrimination against the original inhabitants of this country—the Aboriginal people. If everyone is equal before the law, then the laws which govern our economic life and our social life must apply to everyone equally and not create special privileges

for some at the expense of others. As befits the heirs of those radical democrats who set up our first democratic institutions, much of our political debate and the policies of government can be understood as a working through of the implications of our commitment to democracy.

The development of Australian democracy is a tribute to our civil nature and cooperation. Australian civil society has been built around the family, voluntary associations (civic, political and religious) and small enterprises. Our history contains little evidence of revolution, public riots and violence. One of the great migration programmes of the last century had been accomplished peacefully and in a manner which has demonstrated what is possible in a democratic ethos. Our formal education system is a vital means of maintaining the civil society and also in developing and enhancing our democratic system as we move into the next millennium. Effective democracy is not a static, inflexible concept, but a dynamic, active principle that needs to be continuously cultivated, adapted and revitalised.

Over its history Australian citizenship and national identity has evolved from one developed within the context of the British Empire to one focused on an independent Australian nation. Its democratic tradition has allowed Australia to demonstrate the ability of peoples from different origins and cultures to live peacefully together. Today this identity continues to evolve.

Civics and Citizenship Education— Discovering Democracy

The invigoration of Australian citizenship requires an appropriate combination of civics education and citizenship education. Civics education involves the knowledge that is a necessary precondition for informed and responsible citizenship. Citizenship education supports the skills and capacities that enable citizens to take part voluntarily and

responsibly in the life of civic society and in the governance of their political communities.

Civics and citizenship education is more than just teaching about our political frameworks. Like democracy, citizenship is an ongoing participative process, not a static one. It does require an understanding of our history and institutions which then allows for the ability to comprehend and reflect. Without these skills and involvement, citizens cannot effectively deal with proposed changes or make the informed choices needed for a healthy democratic life.

The programme is guided by the Civics Education Group who have the role of advising on civics and citizenship education and supervising and monitoring funded activities, including the approval of all material, and report to the Minister for Education, Training and Youth Affairs.

Three more kits dealing with citizenship education issues will be produced.

Members of the Civics Education Group

Dr John Hirst
Chair (Reader in History at La Trobe University)

Professor Stuart Macintyre
(Ernest Scott Professor of History at the University of Melbourne)

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Professor Greg Craven
(Foundation Dean and Professor of Law at Notre Dame University)

(Dr Kevin Donnelly is the consultant to the programme.)

The Adult and Community Education (ACE) Sector Learning Circle Discovering Democracy Programme

Material for four learning circle kits will be produced for the ACE sector. The Adult Learning Australia Inc (formerly AAACE Inc) has been contracted to produce the first two kits—The Governance of Australia and The Three Spheres of Government. Further details can be obtained on ALA's web site at <http://www.ala.asn.au>. Two more kits dealing with citizenship issues will be produced.

Each kit includes a general booklet on Learning Circles, session guides for six meetings and a range of resources which can readily be used to inform those discussions. In addition, there are lists of organisations, web sites and additional printed resources material which groups may wish to access.

• Preface

This, the first of four learning circles on civics and citizenship, addresses a series of broad issues about the way in which Australia is governed—the major structures and processes of national government and the desirability of changing or maintaining them.

Where did our system of national government come from, and in what ways have overseas models and practices been adapted to Australian conditions? Do we have a system of government that is capable of meeting the new demands and challenges of the next millennium? Is it now time for Australians to give emphasis to their independence by severing traditional ties with the British monarchy? Are there practical ways in which the governance of Australia can be made more democratic than it is at present?

The Bicentennial

In 1988 Australians celebrated the bicentenary of white settlement and the roots and achievements of the multicultural Australian nation. This was an opportunity to assess the achievements of the first two hundred years of white settlement of the 'great south land' and to take stock of future prospects. It was also an opportunity for white Australians to start to come to grips with the prior occupation of the Australian mainland and surrounding islands by Aboriginal and Torres Strait Islander people, and their claims, ranging from recognition of prior occupation to compensation, treaties and even continuing sovereignty and ownership over parts of, or all of the land. So 1988 was part celebration and part recognition that some individuals and groups had not shared equally in Australia's development and democracy.

The Australian Constitution and the Centenary of Federation—2001

2001 marks the Centenary of Federation—when the Commonwealth of Australia was created from a group of British colonies by an Act of the British Parliament after a campaign which produced broad agreement for federation and the Australian Constitution. Now, a hundred years after our present federal form of government was agreed upon and brought into operation, we can ask if this system has served us well, and will it suffice for the next hundred years—or should we make some changes?

The fact that this centenary coincides with the dawn of a new millennium and follows the world wide focus on Australia as host nation to the 2000 Olympics, highlights the opportunity, and the incentive to reflect on the nation we are and the way we govern ourselves.

European heritage—Asian destiny?

The idea of Australia as a country of European heritage with an Asian destiny provides another key context for reflecting on the way we govern ourselves. As ties of commerce, security, culture and migration have deepened our relationships with Asian and Pacific countries, we may find we need to understand better how these countries—Singapore, China, Malaysia, Japan, Indonesia, the Philippines, and others—govern themselves. New systems of government like that recently instituted in South Africa also provide valuable comparisons.

They do not necessarily, like the countries of Europe and North America, share our ideas of democracy with its roots in classical Greece and western European medieval institutions like the monarchy or parliaments. These societies have different histories, and have made different choices. Can we expect to understand them until we are confident about how we govern ourselves, and to what ends?

Australia and the monarchy

The issue of an Australian monarchy or republic is linked to the question of how we are seen by our Asian neighbours, as well as the logic of our continuing link with the House of Windsor—the heirs and successors of Queen Victoria who signed the Commonwealth of Australia Constitution Act into law in 1900. It can also be approached from the point of view of the problems and advantages created by our historical connection with Great Britain and membership of her empire and commonwealth. Some believe that Australia needs to become a republic in order to truly acquire a distinctive national identity, whilst others believe that Australia already has a unique national identity and that moving to a republic will have little or no impact upon this. For some of those who support a greater sense of continuity, the link to the monarchy has created a sense of security and stability.

Globalisation

In addition, certain aspects of globalisation raise, or re-emphasise important questions about the nation-state and national sovereignty. How 'independent' can a nation the size of Australia be? This is most obvious in the economic arena, but there is also a need for effective transnational policy and decision making in relation to such matters as peace and human rights, environmental questions, crime and information technologies. A more crowded world with cheaper international communications and more global challenges to

meet, raises vital questions about the ability of governments to understand one another, and work together. Australia's role in the United Nations and adherence to its treaties and the consequent use of the Commonwealth's external powers, and Australia's role in regional trade and security groupings, are examples of this.

Indigenous Australians and reconciliation

The debate about Aboriginal reconciliation and Native Title brings its own special questions. How did the Aboriginal nations of Australia traditionally govern themselves, and are there lessons to be learned from this for a modern Australia? Now that the doctrine of *terra nullius*—the proposition that the Australian landmass was not occupied by cohesive communities before British settlement—has been overthrown by the High Court, then what is the basis of the sovereignty of our modern government system? Is sovereignty based on land, or people, or a mixture of both?

Apathy and disaffection

While Australians are generally proud of their free and progressive country, there is also today widespread political apathy, distrust of politics and politicians, and a lack of knowledge and understanding of our political system and how it works. The Civics Expert Group's report *Whereas the people...* (1994) stated that there are low levels of political participation and politics is widely perceived as something remote and inaccessible.

This learning circle invites participants to reflect on the Australian system of government, and whether citizens can and should seek to improve it. What is working well? What is not? What do other countries do better? It covers the basic elements of the present system of government and asks questions about what should be maintained or changed—and why. Should Australian citizens become engaged in the process of building a more democratic Australia?

• The session guides—a synopsis

The six sets of session notes that follow are intended to stimulate and give some direction to discussion, and perhaps further investigation of our present system of government. This subject is obviously vast in scope. These materials are a starting point. They look at the issues from your point of view—that of an interested citizen, and focus on how our system of government works for you and society as a whole, and whether there are some aspects that you would like to see changed. Every issue raised here can be pursued further by those who are interested. The kit points to paths for further inquiry.

The six sets of session notes are structured as follows:



Our Group—Our Government

This session puts forward some ideas for how the learning circle might best get started—including some suggestions for making sure that the circle operates democratically! It then introduces the idea of democracy, the evolution of democratic systems of government and of different types of democracies. It asks participants to reflect on what democracy means at the personal level.

Each of the subsequent sessions looks more closely at a particular aspect or element of our system of government (eg the High Court), highlighting a number of issues for consideration and debate. This includes looking at the role and future of the Constitution, and at the fundamental principle of the 'separation of powers' between the legislature (Parliament), the executive (Prime Minister, Cabinet and the Public Service), and the judiciary (the legal system).



The Constitution: Basis for Stability or Constraint to Change?

With the approach of the Centenary of Federation, and as a result of the Local Constitutional Conventions programme and the 1998 Constitutional Convention, there is growing attention to the issue of constitutional reform. This session encourages you to explore the Australian Constitution—the historical context in which it was produced, the examples from which it drew, and its place in governance today. Does our Constitution need re-writing, and if so is this a matter of minor editing, or wholesale change? Should it be made easier for citizens to change the Constitution in the future? Should the status-quo be maintained?



Parliament—the Legislative Branch of Government

This session turns to the role of the Houses of Parliament—the Legislature. The workings of Parliament are perhaps the most visible, dramatic, and entertaining component of our system of government. For many people, Parliament is government—politicians at work. What is the formal role of Parliament in our system of government, and how are its powers limited? How does the electoral system work? What changes could be made to enable Parliament to work more effectively and be more representative?

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Session 4 The Executive Government—Representative Leaders or Elected Dictators?

This session highlights the role of the Executive branch of government—the Head of State, Prime Minister and Cabinet, and the offices and agencies that support and carry out their executive decisions. Has Parliament become just a ‘rubber stamp’ for the dominant political party and the Executive, which acts as ‘an elected dictatorship’? Most agree that the Executive must always be kept accountable to Parliament. How is this best achieved? Should we change our system of government to make sure that the Executive is more accountable to Parliament or should governments be able to pass their legislation without delay?

Session 5 The High Court of Australia

This session looks at the important place of the legal system—the Judiciary—in the governance of Australia. The ‘rule of law’ that underpins our democratic rights and freedoms tends to be taken for granted and also balances the rule of the majority represented by Parliament. What tensions does this produce and can they be lessened?

In the context of Australia’s governance, the role of the High Court of Australia is especially important. It has also been under close scrutiny. Why should citizens care about the role of the High Court? Should we, and can we, ensure that the High Court is ‘above politics’? Should procedures for appointing High Court justices be reviewed?

Session 6 An Australian Republic?

The final session focuses on the key issue of the Head of State in the Australian system of government. For almost a century Australia has been a stable, democratic, constitutional monarchy, with the British sovereign as our Head of State. The alternative of a republican form of government has been advocated during the same period. Why is the case for a republic of Australia being pressed now, what are its details and what are the main arguments for and against?

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• Contents of this kit

- ABC to Learning Circles—general booklet on Learning Circles

Six session guides

- Session 1: Our group—our government
- Session 2: The Australian Constitution: Basis for stability or constraint to change
- Session 3: Parliament—The legislative branch of government
- Session 4: The executive government: Representative leaders or elected dictators?
- Session 5: The High Court of Australia
- Session 6: An Australian republic?



• Resources beyond this kit

A learning circle kit is not a text. It focuses on finding good questions for groups to ask, rather than laying out all the answers. It seeks to be authoritative in relation to matters of information, stimulating, but brief and simple to read. It points to other resources in the community that the group might turn to.

In addition to radio, TV, and the print media, this kit might be extended by inviting guest speakers, visits to particular organisations, or sites, use of local libraries, and of course, surfing the internet. To assist the search for additional material, we include here a bibliography (which you can build on to), a list of relevant World Wide Web sites, and a list of videos and CD ROMs.

Discovering Democracy—a Guide to Government and Law in Australia by Dr John Hirst is available from the Curriculum Corporation, 141 Rathdowne Street, Carlton, Vic, 3053. This book has been prepared as part of the Discovering Democracy Programme and provides helpful background information to the issues raised in this kit.

• References

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— *Parliament and the Executive Government* (1987), Departments of the Senate and the House of Representatives, AGPS, Canberra (Part of seven part series, with chart on how Parliament makes laws)

— *Questions and Answers on the Commonwealth Parliament* (1997), AGPS, Canberra

— *Representing the People: The Role of Parliament in Australian Democracy* (1994), CCF, Melbourne

— *The Position of Indigenous People in National Constitutions—Conference Report* (1993), Council for Aboriginal Reconciliation, Constitutional Centenary Foundation, AGPS, Canberra

— *Voices for Democracy* (1998), National Archives of Australia (Note: This kit has been distributed to all secondary schools in Australia)

Aitken, Gary (1997) *Understanding the Constitution*, Parliamentary Education Office, Canberra

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• Internet sites

Searches using key words like **governance**, **democracy**, **government**, **citizenship**, **civics** and **politics** as well as particular organisations and people yield an increasingly rich number of sites, which are usually linked to other sites.

The Australian Constitution is available at several sites including the Parliamentary Education Office, Constitutional Centenary Foundation and Australian Local Government Association.

Below is a selection.

ATSIC:
<http://www.atsic.gov.au>

Australian Electoral Commission:
<http://www.aec.gov.au>

Australians for Constitutional Monarchy:
<http://www.norepublic.com.au>

Australian Governments Entry Point:
<http://www.nla.gov.au/oz/gov/>

Australian Labor Party:
<http://www.alp.org.au/>

Australian Local Government Association:
<http://www.alga.com.au>

Australian Republican Movement:
<http://www.republic.org.au>

Commonwealth Attorney-General's Department:
<http://www.law.gov.au>

Commonwealth Parliament:
<http://www.aph.gov.au>

Constitutional Centenary Foundation:
<http://www.centenary.org.au>

Curriculum Corporation:
<http://www.curriculum.edu.au/democracy/index.htm>

David Moss's Australian Politics Resource:
<http://www.adfa.oz.au/~adm/politics/>

Democracy in Australia:
<http://www.mq.edu.au/hpp/politics/y67xa.html>

Democrats:
<http://www.democrats.org.au>

Education Australia Network:
<http://www.edna.edu.au/EdNA>

Founding Documents
<http://www.foundingdocs.gov.au/>

High Court of Australia:
<http://www.hcourt.gov.au>

Legislative Assembly, Australian Capital Territory:
<http://www.legassembly.act.gov.au>

Legislative Assembly, Northern Territory:
<http://www.nt.gov.au/lant/>

Liberal Party:

<http://www.liberal.org.au>

National Party:

<http://www.ozemail.com.au/~npafed/>

Parliament of New South Wales:

<http://www.parliament.nsw.gov.au>

Parliament of Queensland:

<http://www.parliament.qld.gov.au>

Parliament of South Australia:

<http://www.parliament.sa.gov.au>

Parliament of Tasmania:

<http://www.parliament.tas.gov.au>

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Parliament of Western Australia:

<http://www.parliament.wa.gov.au/parliament/homepage.nsf>

Parliamentary Education Office:

<http://www.peo.gov.au>

Women's Constitutional Convention:

<http://www.womensconv.dynamite.com.au/index.htm>

• Videos and CDs

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One Destiny! The Federation Story (1997), Global Vision Productions Pty Ltd

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The Dismissal (1982), Kennedy Miller Productions

Political Power (1988), Film Australia

A Powerful Choice, ABC TV and Corporate Production, (PEO)

Cinemedia in Melbourne (phone 03-9929 7044) have taken over the administration of the National Library of Australia film and video lending collection which includes many of the above videos. Their web site is <http://cinemedia.net/> and the catalogue can be checked from there. Costs are \$12 a film (16mm) and \$9 for a video plus return costs.

The Sound and Vision Office of the Australian Parliament House (phone 02-6277 8101) sell videos of parliamentary debates on order.



• Glossary of terms

Act of Parliament	A law made by Parliament; a bill which has passed three readings in each House and has received Royal assent.
Agencies	Originally government administration was divided into departments—the Department of Defence, the Department of the Treasury, and so on. As the years went by a large number of statutory bodies (e.g. the Australian Electoral Commission) have been formed, until they outnumbered the departments. These bodies are called agencies.
Appropriation	The voting of money by the Parliament for expenditure by the government.
Appropriation Bill	A bill which, if passed by the Parliament, will allow the government to spend money it has gathered through taxation on government services, public works and other programmes.
Australian Ballot	Australia pioneered secret voting in the nineteenth century and at the time it was called 'Australian ballot'.
Backbencher	A member of Parliament who is not a member of the Ministry or Shadow Ministry.
Balance of Power	When one person, a group or party has the ability to decide an issue by the way they vote, that person, group or party may claim to have the balance of power.
Bicameral	A Parliamentary system with two houses, referred to generally as an upper and lower house.
Bill	In the parliamentary sense, a draft of an Act of Parliament, which the members will consider and may alter. It remains a Bill in its passage through Parliament, becoming an Act when the Governor-General gives the Royal assent by signing it.
By-election	When a parliamentary seat becomes vacant because a member of Parliament dies or retires, a by-election is held for that seat only. (See also general election).
Bill of Rights	A statement of the fundamental rights and privileges of the people, which the government cannot over-ride if it is built into the Constitution. Australia does not have one.
Bipartisan	'Bi' means two, 'partisan' means a person who supports a cause or a party. When a matter brought before the Parliament has the support of both major political parties, it is said to have bipartisan support.

Cabinet	The group of most senior ministers of a government, lead by the Prime Minister.
Caucus	A meeting of a group. Usually refers to the parliamentary membership of a political party, especially the Labor Party.
Coalition	An alliance between two separate political parties which maintain their own identity and rules. The Liberal/National Party coalition is an example in Australian politics.
Colony	A place or territory that is governed by a ruling power from which it is physically separated.
Committee of the Whole	A committee consisting of all members of the Senate or the House of Representatives, usually formed to consider a bill in detail.
Common Law	Law that is developed by the courts through the decisions of judges, as distinct from statutory law made by the Parliament. British common law came to Australia with British settlement, and Australian common law has had a parallel development.
Commonwealth	This word comes from an old English word 'commonweal', which has been in use since at least 1469, meaning for the common good of the people. In relation to the Constitution it means the uniting of States for the common good. The opening sentence of the Constitution says that the States 'have agreed to unite in one indissoluble Federal Commonwealth'.
Consolidated Revenue Fund	The account maintained by the Treasury into which all the income of the Commonwealth is brought together.
Constituent	Someone who votes or lives in a particular ward, division or electorate which a Member of Parliament or councillor represents.
Constitutional Monarchy	A system of government in which a Constitution and its unwritten conventions limits the powers of an hereditary monarch and regulates the operation of government.
Convention	First meaning: The coming together of a group of people for a common purpose, as for example to design a Constitution or to make changes to the Constitution. Second meaning: A treaty or agreement on a specific subject reached between nations, such as the International Convention (Safety of Life at Sea). Third meaning: A way of doing things that is not written into law but is understood and respected by the people concerned.
Crossing the Floor	When a member from the government or opposition votes with the opposite group, seated on the other side of the parliamentary chamber to where the member normally sits.
Customs Duty	A duty or tax on goods imported into Australia.

Democracy	A system of government where power ultimately rests with the people, either in a direct way or through the right to elect representatives.
Dictatorship	A system of government in which the leader, the dictator, has supreme power and positions of authority are filled by appointment rather than election.
Dissolution	The formal order given by the Governor-General to end a period of a Parliament and initiate an election. A double dissolution is when both Houses of Parliament are dissolved.
Division	A formal vote in Parliament when members move to either side of the speaker's chair to register their vote—affirmative to the right of the chair, negative to the left.
Donkey Vote	This occurs when a voter lists their preferences from top to bottom on a ballot paper.
Executive, The	The branch of government charged with the day-to-day running of the affairs of the nation.
Executive Council	The federal Executive Council is formally, with the Governor-General, the chief executive authority of the Commonwealth—the council of ministers which advises the Governor-General and gives legal form to cabinet decisions.
Faction	An organised, permanent group within a political party.
Federalism	A system of government which combines self-rule with shared rule, and in which power is shared between a central government and more local levels of government. Australia has a federal system, with the central government in Canberra and the more local levels of government in the States.
Federation	The forming of a nation by the union of a number of States which divide their powers with a national Parliament.
Founding Fathers	A popular name for the group of men who prepared the Australian Constitution and established the Australian federation. This phrase is also used to describe the constitution makers of the United States of America.
Franchise	The right to vote in elections. Franchise may be restricted on the grounds of age, property ownership or even gender or race. All these qualifications have been used in Australia since the first elections in New South Wales in 1843. Currently the franchise in Australia is restricted to any person at least 18 years old, who is an Australian citizen, who has lived in Australia for six months continuously, and in the electoral subdivision for which they wish to vote for at least one month. Certain people are disenfranchised: people of unsound mind; people under sentence of imprisonment for five years or more; people convicted of treason. Until 1984 a British resident in Australia had the franchise automatically even if they were not Australian citizens. Now they, and all voters, must be Australian citizens.

Frontbenchers	Members of Parliament who hold positions in the ministry or shadow ministry. They sit on the seats immediately to the left and right of the Speaker.
Gag	A parliamentary motion, usually presented by a member of the government, to bring a debate to an end.
General Election	An election in which all seats for Parliament declared vacant are contested.
Gerrymander	A drawing of the electoral boundaries in such a way as to create an advantage for one party.
Guillotine	A parliamentary motion which places a time limit on the length of a debate.
Hansard	A word by word record of parliamentary debate.
Her Majesty in Council	See Queen in Council.
High Court	Australia's highest court of appeal, set up under Section 71 of the Constitution to decide on matters of dispute which are brought before it and interpret the Constitution.
House of Commons	The English equivalent of the Australian House of Representatives.
House of Representatives	One of the two Houses of the Parliament of the Commonwealth, often referred to as the Lower House. The Prime Minister and most Ministers are members of this House, and it is where most legislation is introduced.
Independent	A candidate for an election who is not formally linked with a political party.
Informal Vote	A ballot paper which has been incorrectly marked and, therefore, is invalid.
Instrument	A very broad legal term to mean something in writing which has a particular effect. Regulations, statutory rules, etc., come within the definition of instruments.
Inter-State Commission	A body set up at the time of Federation with a supervisory role in relation to trade and commerce. The body has ceased to exist, but references to it have not yet been deleted from the Constitution.
Judicature	An umbrella term to describe the system of the courts and judges.
Judiciary	A narrower meaning than 'Judicature', usually used to refer to the judges as distinct from the court system.
Jurisdiction	The extent of a court's authority to transact business, especially the nature of cases it can hear. The Family Court has a wide jurisdiction in family-related matters only. In state courts jurisdiction often refers to amounts of money. A small claims court may have the jurisdiction to deal with claims up to, say, \$3000. Claims above that amount go to another court.

Justice of the High Court	A judge of the High Court.
Legislation	A law or set of laws passed by Parliament.
Liberalism	A philosophy which stresses the rights and value of individual freedom as against that of the State.
Lower House	House of Representatives.
Malapportionment	A situation where the number of voters in one electorate is significantly higher or lower than the number in another electorate. It creates a situation where one person's vote is stronger than that of another person. This is sometimes incorrectly referred to as a 'gerrymander'.
Ministry	Members of Parliament appointed by the Governor-General, on the recommendation of the Prime Minister, who form the Executive Government.
Ombudsman	An official appointed by the government to investigate complaints against government departments.
Parliamentary Democracy	A system of government in which power is vested in the people, who exercise their power through elected representatives in Parliament.
Parliamentary Secretary	A Member of either House appointed to the executive council and responsible for assisting a minister in routine parliamentary and administrative tasks—while having no power to introduce legislation or being held responsible for the conduct of the portfolio.
Party Discipline	In order to perform effectively as a united body, each party expects its members to support policy and the leadership. In the Labor Party this is more formalised than in the case of the Liberal Party, but both parties exercise strong party discipline.
Party Room	Used with respect to the Liberal Party and the National Party, it has the same meaning as 'caucus' to the Labor Party—the assembly of the Liberal or National members of Parliament meeting privately in Parliament House to decide matters.
Plebiscite	A ballot taken by a government, usually in the form of asking for an answer YES or NO to a question, to get an indication of public feeling on the question.
Portfolio	The area of responsibility or duties of a minister in the government—the department for which a minister is responsible.
Preamble	The opening statement in a parliamentary Bill or in certain other legal documents. It nearly always starts with the word 'Whereas...', and goes on to explain the background to or the reason for the Bill that follows.

Pre-selection	The process adopted by political parties to select and endorse candidates for election.
Press Council	An independent authority established by the commercial media to investigate complaints against the media.
Pressure Group	An organisation or group of people who seek to influence government policy in accordance with their own sectional or ideological beliefs. They may stand candidates for election but usually they are more concerned with influencing policy than participating formally in the Parliament.
Private Member's/Senator's Bill	A Bill introduced into the Parliament by a member who is not a member of the ministry.
Proportional Representation	An election system that is possible only where the law provides for more than one member to represent an electorate, as in the Australian Senate. The Senate system is designed to return members from each party more or less in proportion to the number of votes cast for that party. The system does not apply to single member electorates, such as those prescribed for the House of Representatives.
Prorogue	A routine happening when the proceedings of the Parliament are discontinued by the Governor-General, usually at the end of a year. The Parliament as elected remains alive and is reconvened at a future date.
Protectionism	In colonial terms, the policy of imposing duties at the border of a colony to prevent or to discourage the movement of goods and livestock into the colony.
Queen in Council	This term had a special meaning relating to court appeals, which is the sense in which it is used in the Australia Act 1986. The highest court of appeal in the United Kingdom is the Judicial Committee of the House of Lords, comprised of an elite group of judges who are elevated to the peerage on taking office. It used to be the case that those same judges would sit on appeals from Dominion courts, and were called in that capacity the Queen in Council, Her Majesty in Council, or more commonly the Privy Council. The Queen had no judicial role at all. As a result of Section 11 of the Australia Act 1986, which terminated appeals to the Privy Council, it no longer applies to Australia.
Question Time	A section of the parliamentary day which provides members of all parties with the opportunity to question ministers on a wide range of issues. Although it is open to abuse by government and opposition alike, it is a very important part of the parliamentary process.
Redistribution	The process of redrawing electoral boundaries according to a range of established criteria. Changes in population density require such redistributions to be conducted on a regular basis in order to ensure that the number of voters in each electorate is roughly equal, that is, to maintain the practice of one vote, one value.

Referendum	A ballot similar to a plebiscite, but linked in Australia with the approval or rejection of a Constitutional Amendment Act. A proposal to change the federal Constitution must first be passed by the Parliament and then put to the people. To be successful the proposal must be passed in four of the six States and it must also achieve a national majority of votes. (See Section 128 of the Australian Constitution).
Republic	A state in which sovereignty is derived from the people, and in which all public offices are filled by persons ultimately deriving their authority from the people.
Revenue	The income of a state or a nation arising from taxation and other sources.
Seat of Government	The capital city.
Select Committee	A group of members of either or both Houses appointed to inquire and report on a particular matter, whereafter the committee ceases to exist.
Senate	One of the two Houses of the Parliament of the Commonwealth wherein each State has equal representation regardless of its population. The upper, or States' house or 'house of review'.
Shadow Ministry	Members of the main opposition party or parties in Parliament who are spokespersons in areas which usually match the areas of responsibility of ministers in the government.
Socialism	A economic system which favours government control and ownership of the economy in order to be able to bring about a higher degree of equality throughout society.
Sovereignty	The independent source of power in any political system.
Speaker	A person elected by the members of the House of Representatives to preside at meetings of the House. The corresponding office in the Senate is that of President. This office should not be confused with a President of a republic.
Standing Committees	A group of parliamentarians appointed by either or both Houses to inquire into certain matters and existing for the life of the parliament.
State	First meaning: An independent nation. Second meaning: A geographical and political area that is part of a federation.
Statutory Authority	A government agency set up by an Act of Parliament, more or less independent of ministerial control but responsible ultimately to Parliament.
Supply	Interim finance authorised by the Parliament pending approval of the detailed Appropriation Act.

Ultra Vires	'Outside the powers'. When the Commonwealth Government, which has restricted powers to make laws, called meetings with the States to pass uniform gun laws on a co-operative basis, they did so because, under the Constitution, they had no power to make gun laws for the nation. If they had gone ahead and passed an Act setting up gun laws for the whole nation the Act would have been <i>ultra vires</i> and invalid.
Unitary System	A system of government that provides for one central government authority, such as Britain or New Zealand, rather than dividing power between a central authority and regional authorities such as occurs under a federal system.
Upper House	The Senate and State Legislative Councils are Australian examples.
Westminster System	The parliamentary system that largely exists in Australia, adapted from the United Kingdom system, named after the London borough in which the British Houses of Parliament are situated.
Writ	In the Parliamentary sense, a document requiring something to be done, as for example a writ by the Governor-General to call an election.

• Evaluation form

To Civics Learning Circles Project, Adult Learning Australia Inc.,
PO Box 308, Jamison Centre, ACT, 2614. Phone: 02-6251 7933 Fax: 02-6251 7935 e-mail info@ala.asn.au

Group Registration Details:

.....

☐ Please register our group for further civics learning circles

Address:

.....

Contact person for correspondence:

Address and phone number (if different to above):

Expectations of the group at the beginning:

.....

.....

What were the best aspects of the kit?

.....

.....

What could have been better about the kit?

.....

.....

How did you modify and/or extend the kit?

.....

.....

What were the outcomes for the group/individual?

.....

.....

Please include some comments from members about your learning circle:

.....

Thank you for taking the time to complete this evaluation

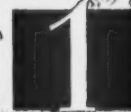
• Resource materials

1. Republic—Yes or No? (Dept PM&C)
2. Constitutional Convention brochure (Dept PM&C)
3. Electoral Systems of Australia's Parliament's and Local Government—Australian Joint Roll Council—in pamphlet form (AEC)
4. All You Wanted to Know About Australian Democracy (AEC)
5. Information Sheet—Australia a Federal Nation (AEC)
6. Information Sheet—Constitutional Amendment Process (AEC)
7. Behind the Scenes—AEC 1996 Federal Election Report (AEC)
8. Information Sheet—Constitutional Referendums (AEC)
9. Australian Democracy Magazine (AEC)
10. Electoral Pocket Book (AEC)
11. Politics & Legal Studies Brief—Constitutional Monarchy or Republic (PEO)
12. Legal Studies Brief—Making Laws (PEO)
13. The Australian Constitution (CCF)
14. Round Table—The People's Convention (CCF)
15. Round Table—The Constitutional Convention (CCF)
16. High Court of Australia brochure (High Court)
17. Republic—Your Choice *The Weekend Australian 8–9 November 1997*
18. Parliamentary and News Network schedule
19. Video—'A Powerful Choice' (PEO)

Note: This resource is not included in all kits. If you wish to see it arrange to borrow it from a local school, public library, electoral education centre or Cinemedia.



Session



Our Group

OUR GOVERNMENT

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DISCOVERING
Democracy

The Governance of Australia ~ Kit 1



• Introduction

This first session is designed to help your learning circle get going, and to pose some questions about democracy and generally how Australia is governed today.

The aims of the session are:

- for members of the group to get to know each other;
- to share the interests, experiences and expectation that bring members to the learning circle;
- for group members to familiarise themselves with the contents of the kit;
- to begin exploring the kind of government Australia has and its strengths and weaknesses; and
- for the group to develop a plan for their future meetings.

Learning circle participants should read the session guides before meeting and decide which aspects of the guide they wish to follow up. This will usually be by discussion, however, a learning circle may decide to involve visitors as guest speakers, view a film or video, visit an appropriate site, do individual or small group research and interviews, compile a press cutting scrapbook or maintain diaries. Some activities within sessions may be of more interest than others and indeed some sessions may lead the group into more detailed discussions which cause them to curtail other sessions.

The activities of the learning circle should reflect the interests and concerns of its participants. These will evolve as the learning circle group continues to meet in a spirit of enquiry and democracy.

Suggested activities

Informal interaction	2
Welcome and round table	2
Guidelines and procedures	2
Customising the kit	4
What the governance of Australia means to us	5
What democracy means to us	6
Democracy and the individual	8
Comparison with other countries	9
Conclusions, evaluation, tasks for the next session.	10
Background document 1	11
Monty Python and the Search for the Holy Grail	
Background document 2	13
Types of democracy	
Background document 3	16
Governments of the world	
Background document 4	17
Features of democratic societies and governments	

Resources

- *ABC to Learning Circles*
- *Australian Democracy Magazine*, 1997, Australian Electoral Commission

• Informal interaction

When you arrive:

- greet each person there and identify the facilitator;
- fill out a name tag;
- check your details on the contact list;
- look at the material in the kit; and
- talk informally about the activities you are interested in.

• Welcome & round table

The facilitator should start the meeting by introducing himself/herself and explaining his/her expectations and then proceed by asking each person to introduce themselves and explain their expectations about the learning circle.

Alternatively the facilitator, or a participant, could suggest using a time-tested 'warm-up' activity—such as talking to the person next to you and after three to five minutes introducing them to the group by telling the group the most interesting thing you have found out about that person, and/or their expectations of the learning circle.

• Guidelines & procedures

Note: The booklet The ABC to Learning Circles, included in the kit provides more detail about participating in and facilitating learning circles.

Remember that learning circles are designed to help people learn from each other, using material provided in the kit (session guides and other resources) and material gathered from elsewhere as a framework. Remember it is not a text or curriculum, but a guide.

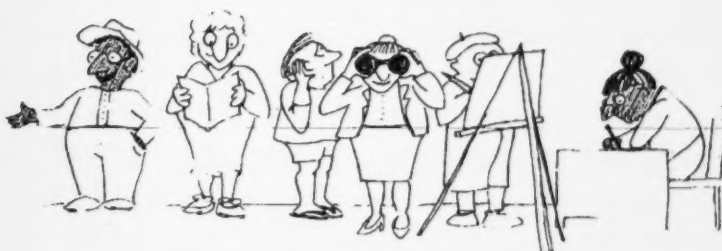
Some tips for this, and later, sessions:

- Decide on the length of your meetings, when you will have a break and when you will finish (including packing up resources and equipment).
- Learning circle members are good listeners and help other people express their ideas by being active listeners (i.e., showing interest with body language, eye contact, talking notes, etc.). Of course, the group members may have already done a listening exercise by talking to and introducing their neighbour. How successful was it?
- Keep contributions short so everyone gets a chance to speak. This will reduce the chance of being interrupted. The facilitator may have to intervene.
- Asking everyone their views will give everyone a chance to speak and listen. Facilitators should try to avoid going round the circle, as the last respondent is immediately put in a difficult position.
- Remember, everyone has the right to express their views and opinions.

- Disagreement over an issue is fine, but don't make disagreements personal. Be hard on the subject, not the people.
- Try to include a variety of activities as people learn in different ways, including speaking, reading, listening, viewing, drawing, writing, role plays and so on.
- Like most human activities, a learning circle usually gets better with practice! Be patient, look for positive outcomes and relationships, and learn more about each other and the subject area.

Discussion:

Establish some ground rules. Your learning circle should discuss and agree on a few basic ground rules for the way they want to operate. This is democracy in action! You may wish to use established meeting procedures, or develop alternatives. These rules could be changed or added to later on as the learning circle develops, but you should decide how!



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• Customising the kit

The first session offers focus questions to encourage participants to consider what is democracy, what are the main elements of our present system of government, its strengths and weaknesses, and participants' concerns about issues which impinge on governance, and ideas for the future. This is an important session, however the group, after establishing its goals, may wish to focus on sessions of relevance to those goals and not feel they have to cover all sessions.

Familiarise yourselves with the resources provided in the kit and consider whether you need to access additional resources from the suggested list and/or from your own resources.

Remember that these kits have been developed for learning circles all around Australia and cannot give detailed information on local areas and issues. Consider developing a list of personal and local concerns and then perhaps consider how typical they are.

Remember that the kit offers a range of material—you don't have to 'do' it all, and you don't have to 'do' it in the order it is printed

You are also encouraged to invite local guests (speakers or otherwise!) and arrange visits to places which help you understand and extend the learning circle material. These may be places of government (e.g. Parliament Houses, Council Chambers) electoral education centres, local libraries, museums or historical locations.

Remember that the kit offers a range of material—you don't have to 'do' it all, and you don't have to 'do' it in the order it is printed. You may decide to leave out a session or two, or have two or more sessions where the kit allows for one. It is your learning circle!

• What the governance of Australia means to us

Governance means different things to different people, as the group will see in the following sessions of the learning circle. Whereas some people will be fascinated with the details of elections, others will be concerned about aspects of the law that arise from the Constitution and parliamentary legislation and others will be fascinated by the lifestyles of politicians, lobbyists and media personalities. Some will regard it as their main source of humour and will have a rich fund of political jokes.

Others will see governance directly connected to their personal aspirations whether these involve getting or keeping a job, being a member of a political party, a trade union, a professional association or seeking government recognition of a community, social, or occupational group. Others may have worked on polling booths, handed out how-to-vote-cards or have been party scrutineers at elections. Some will have been involved in strikes, demonstrations or lobbying campaigns to get their political point of view across and to get a better deal for their group. Others may have met their parliamentary representatives individually or have had correspondence with them.

These experiences may have been directed at Commonwealth, State or local government and may have resulted in a new pedestrian crossing in front of a school, increased benefits for veterans or changes in the law or its administration. If the personal is the political then everyone has relevant experiences.

Look at the focus question and use it as a guide to get discussion going. Make sure everyone in the group gets a chance to speak. If the group is large, maybe it would be easier to discuss the questions in pairs before talking as a complete group.

Activity:

The print and electronic media constantly reports matters of governance and politics. As a group, list some of the most topical words and phrases that are reported and discussed in your workplace, with family or when you are relaxing with friends. Write them up on butcher's paper or a white/blackboard and then go around the group with each person reflecting on what these words and phrases mean to them.

Some starters:

- an Australian republic;
- reconciliation;
- States rights; and
- behaviour of politicians.

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• What democracy means to us

'Democracy' is a commonly used word. When children are restricted or overruled by their parents they often reply 'I thought we lived in a democracy!'. Most Australians would claim that our elections and government are democratic. Our community organisations claim they are run in a democratic manner. However, do all these uses mean the same thing?

'Democracy' is also a complex word, as it can incorporate both a set of ideals (e.g. freedom of speech and equality before the law) and the practice of government (e.g. voting rights for all citizens, agencies to seek government accountability). It often needs to be used with adjectives—parliamentary democracy, direct democracy, industrial democracy, electoral democracy—and has changed its meaning over time.

Here are some comments about democracy.

It has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.

Winston Churchill in the House of Commons, 1947

Until about a hundred years ago democracy was a bad thing. In the next fifty years it became a good thing, and in the last fifty years it has become an ambiguous thing.

C.B. Macpherson in *The Real Meaning of Democracy*

Democracy is more complex and more intricate than any other political form.

Giovanni Sartori in *Democratic Theory*

Democracy is government of the people, by the people, for the people.

Abraham Lincoln

Cut the power to the people

We fail to realise how recent an experiment in government democracy is. A couple of hundred years—and invented by dead white European males at that.

Yet in its short life it has produced greater, and worse, tyrants than the whole of recorded human history prior to its advent. It has also produced more bumbling incompetents. The vast majority of these murderers, put into power by the people, through democratic revolution or the ballot box, together with the capacity-challenged presidents and premiers, have been themselves men, and occasionally women, of the people: postcard artists, Grantham grocers' daughters, that sort of thing. Democracy puts demons and dumb-bums there. Democracy is both stupid and evil.

Democracy gives people the right to choose by whom they should be governed. It is a right that they do not deserve and they should not have. Democracy has proved disastrous for humanity. It has, as well as giving dictators and dimwits power, created the ecological disaster we are now told constitutes Parent Earth.

Democracy is a stinking paradox. It gives licence to the unworthiest of human beings and human traits. We get the politicians we deserve. It will go on, as leaders and politicians grow ever more adept at using the power bestowed on them by the people. The labels may change: but is John Howard and his government all that different from Paul Keating and his? Or Tony Blair's from Margaret Thatcher's? Or, in the past, Hitler's from Stalin's?

It is not adversariness that determines the woeful evil of democracy. It is the nature of democracy itself. The wise and the good will always be a minority. That is why we cannot now turn back

the clock. Give the rampant sinfulness and corruption that reposes in the majority of humankind the power it craves—and democracy has done just that—and look at the state we are in.

Bill Mandle, *The Canberra Times*, 29 March 1998

Attack on democracy offensive

Bill Mandle's gratuitously offensive piece in the Sunday Times demands a response. It is not only an abuse of journalistic licence but displays, as well, the author's own ignorance.

Democracy is not, as Mandle dismissively describes it, an experiment in governing that is only 'a couple of hundred years' old. On the contrary, democracy as a structure for political expression began in Athens nearly 2,500 years ago, and flourished in the Greek world. And far from proving disastrous for the Athenians, the period was an immense intellectual and cultural flowering never seen before or since.

In addition to imply that Pol Pot and Mao Zedong are products of democratic systems merely advertises Mandle's intellectual bankruptcy, and is as laughable as his suggestion that the ecological crisis facing the planet is purely a product of democratic politics. Only the bigoted and the ignorant would deny that the pollution and ecological problems the planet faces are the by-product of a rampant capitalism that does indeed, appeal to the selfish, envious and greedy amongst us.

Andrew Wilson, *Narrabundah, The Canberra Times*,
2 April 1998

Discussion:

What do you think of the opinions expressed by Mandle and Wilson?

Most descriptions of modern Australia would describe it as a democracy, and some claim that Australia was a pioneer in developing democratic government over a century ago. But what does this really mean?

Make a list (in pairs/small groups/or as a complete group) of the main features of a democracy. Which ones are the most important? How does Australia rate? (If you need some suggestions look at Background document 4, p 17).

Discuss and try to reach agreement on two areas in our system of government that could be made more democratic.

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• Democracy and the individual

When we discuss democracy and democratic government we can identify many qualities and perspectives. This has lead political commentators to identify some different types or styles of democracy. These are outlined in Background document 2 (p 13). Some would describe a constitutional monarchy as democratic, others would not. Liberal democrats would disagree with social democrats about many issues—such as law and order, economic management and industrial relations. They would probably also disagree about the questions of constitutional change currently being discussed in Australia. Others feel that being able to vote in fair elections is enough evidence of a democratic system.

Researchers who have studied the social psychology of democratic groups and democratic behaviour have identified six core attitudes and values of democracy:

Fairness—equal rights and opportunities.

Open-mindedness—willingness to suspend judgement and to tolerate ambiguity.

Realism—a respect for the facts.

Freedom from unnecessary status consciousness.

Individual self-acceptance and self-confidence.

Friendliness, generous assumptions about human nature ('fraternity').

(For more details see Lippitt, R. & White, R.K. (1960) *Autocracy and democracy. An experimental inquiry*, Harper, New York)

Democratic leaders—of groups, or organisations, or in the community—are those who hold, and encourage such attitudes and values.

Discussion:

Would you describe yourself as 'democratic' in the roles that you play in your family, workplace, or community?

Do you ever dream about being a dictator for a day to sort out all those things which frustrate you? Which things would you change? Would the changes enhance or limit democracy?

Can the group identify and discuss some Australian women and men who have shown outstanding democratic leadership in and out of parliament?



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• Comparison with other countries

Many learning circle members will have had some experience of other systems of governance. They may be immigrants to Australia, have connections through their families with other countries, or may have visited other countries to work or tour. If not, members will probably have visited other countries through current affairs programs on their televisions and their reading! This wealth of personal experience can be used by the group to explore aspects of democracy and governance. The material in Background document 3 (p 16)—'Governments of the world'—may help in this activity.

Activity:

Share your experiences (briefly!) of government systems in other countries. Try and agree on one example of a system of government that is less democratic than Australia's, and another that is more democratic. Can the group agree? What are the most important features of democracy and government that you have used in trying to decide?

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• Conclusions, evaluations and tasks for next session

Before finishing, members should reflect on what has been learned, and the way the session has run. You might also confirm the time and place for the next session, and decide on any preparations for it. The following are possible tasks.

What does each learning circle member feel has been achieved in this session? Was it what you agreed at the start? What goals do you want to achieve for the rest of the programme?

Which areas have not been covered and should extra time be allowed in a later meeting?

Were there any problems with the way the session was conducted? If so, how can they be fixed? Does everyone agree?

Confirm the time and place for the next session. Discuss if any extras are needed—audio-visual equipment, refreshments, etc.

Discuss preparation for the next meeting. How will the Kit's resources be divided up between the sessions? Are extra resources needed? Who will get them? Are there any issues, problems, questions that need to be followed up from the first session? Who will do this work?

Distribute Session Two notes.

Optional extra activity:

Consider starting a Learning Circle journal—a place for notes, press cuttings and other information, and your personal thoughts and ideas about the group and its activities. This journal could remain a private project or could be used in learning circle discussions.

Next Session: The Constitution: Basis for Stability or Constraint to Change?

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Background document 1

Monty Python and the search for the Holy Grail

You may prefer to watch this satirical commentary on government on the commercially available video (probably in your local video shop or even public library). It is also available in audio and print form.

Scene: King Arthur is travelling the medieval English countryside with his valet, searching for recruits for his Round Table and an honourable mission for the group he seeks to form. He sees a group of serfs working in a field, and an imposing castle in the distance. He stops and says:

King Arthur: Old woman!

Serf: Man!

Arthur: Man, sorry. What knight lives in that castle over there?

Serf: I'm 37.

Arthur: What?

Serf: I'm 37. I'm not old.

Arthur: Well, I can't just call you man.

Serf: Dennis.

Arthur: Well I didn't know you were called Dennis.

Serf: You didn't bother to find out, did you?

Arthur: I did say sorry about the old woman, but from behind you looked...

Dennis: What I object to is that you automatically treat me like an inferior.

Arthur: Well, I am king.

Dennis: Oh, king, eh! Very nice! And how did you get that, eh? By exploiting the workers! By hanging on to outdated imperialist dogma which perpetuates the economic and social differences in our society. If there is ever going to be any progress...

Female Voice: Dennis, there is some lovely filth down here! Oh! [sees Arthur] How do you do?

Arthur: How do you do, good lady? I'm Arthur, King of the Britons. Whose castle is that?

Old woman: King of the who?

Arthur: The Britons.

Old woman: Who are the Britons?

Arthur: We all are. We are all Britons, and I am your King.

Old woman: I didn't know we had a king. I thought we were an autonomous collective.

Dennis: You're fooling yourself. We're living in a dictatorship. A self-perpetuating autocracy in which the working classes...

Old woman: There you go, bringing class into it again.

Dennis: That's what it's all about, if only people would...

Arthur: Please, please, good people. I am in haste. Who lives in that castle?

Old woman: No-one lives there.

Arthur: Then, who is your lord?

Background document 1

Old woman: We don't have a lord.

Arthur: What?

Dennis: I told you. We are an anarcho-syndicalist commune. We take it in turns to act as a sort of executive officer for the week.

Arthur: Yes...

Dennis: But, all the decisions of that officer have to be ratified at a special bi-weekly meeting.

Arthur: Yes, I see...

Dennis: By a simple majority in the case of purely internal affairs...

Arthur: Yes, be quiet...

Dennis: And a two-thirds majority in the case of...

Arthur: Be quiet! I order you to be quiet!

Old woman: Order, eh? Who does he think he is?

Arthur: I am your king!

Old woman: Well, I didn't vote for you!

Arthur: You don't vote for kings!

Old woman: Well, how do you become king, then?

Arthur: The Lady of the Lake, her arm clad in the purest, shimmering samite held aloft Excalibur from the bosom of the water, signifying by Divine providence that I, Arthur, was to carry Excalibur. That is why I am your King!

Dennis: Listen, strange women lying in ponds distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses. Not from some farcical aquatic ceremony.

Arthur: Be quiet!

Dennis: You can't expect to wield supreme executive power just because some watery tart threw a sword at you!

Arthur: Shut up!

Dennis: I mean if I went around, saying I was an Emperor just because some moistened bint had lobbed a scimitar at me, they'd put me away.

Arthur: Shut up! Will you shut up!!

Dennis: Now we see the violence inherent in the system. Come and see the violence inherent in the system! Help. Help. I'm being repressed!

Arthur: Bloody peasant.

Dennis: Oh, what a give away. That's what I'm on about. Did you see him repressing me? You saw it, didn't you?

Does this skit throw any light on the question of what is and isn't democratic?

Background document 2

Types of Democracy

Democracy is usually regarded as having two main forms: direct or participatory democracy, and representative democracy. 'Liberal democracy' and 'social democracy' are two common styles of representative democracy.

President Sukarno, leader of Indonesia from its independence to 1965, developed an alternative approach which he called 'guided democracy', which gave great influence to himself, as President.

Direct democracy

Direct, or participatory democracy claims its roots and its name in the *plakas* (market places) of classical Greece. However, although some Greek city-states were democracies, others were oligarchies. Democracy is the conjunction of the Greek words *demos*—people, and *kratia*—rule. The free citizens of the small Greek city-states gathered together regularly to discuss and vote on their affairs. All matters were discussed in an open way, with all attendees having an equal chance to speak, and all were able to influence the decision by speaking and voting.

Although the Greek city-states comprised, in the case of Athens, up to 300,000 inhabitants, only citizens (males over 30 years), who are estimated to have numbered 20,000–40,000, could participate in their government. This excluded women, youths, all slaves and resident aliens. However, even these numbers made mass meetings impossible. Although all citizens had equal right to membership of the governing

bodies, these had to be of a manageable size.

In Athens, for which we have good descriptions, they were the assembly of citizens, the council and the courts. The assembly held some 40 meetings a year and decided all the internal and foreign policies of the city-states, who sometimes were at war with each other. It had wide membership who were active in its debates.

Plato described it thus: 'When the debate is on the general government of the city, anyone gets up and advises them, whether he be a carpenter, a smith or a leather worker, a merchant or a sea captain, rich or poor, noble or humble'. However, the agenda of the assembly was determined by the council. It was also an elected body of 500 elected from the electoral districts, called 'demes', of Athens. The third body, the juries consisted of 6000 citizens chosen annually by lot to form popular law courts. They were not professional judges or lawyers. The juries acted as guardians of the constitution and of law and order generally.

In addition to these governing bodies, ten generals were chosen by all the citizens. They controlled defence and foreign policy and commanded a citizen army in wartime, when a citizen transformed himself into a soldier by 'going home for his shield, his spear and his rations, and reporting for orders'.

Are some or all of the elements of Athenian direct democracy relevant to Australia today? How have the ideas and practices of those times been incorporated into modern democracies?

Background document 2

Representative democracy

Representative democracy had its birth in the development of medieval nations in Europe. Medieval landowners, and later merchants, demanded a say in governments which to that time had been dominated by Kings. Up to that time monarchs had asserted that their power was based on the Divine Will of God and they did not recognise the sovereignty of the people they governed. From the 12th century merchants, landowners and others gathered together to elect representatives who then went to a central place, called a parliament in Western Europe, to discuss and vote on their country's affairs.

This beginning was a long way away from modern representative government, as it was typically based on a very limited, aristocratic, male franchise. The right to vote was gradually extended, as was the size of the 'Houses' of Parliament, and the powers of the monarchs were progressively limited.

By the end of the eighteenth century the age of written, democratic constitutions had begun, when the Constitution of the United States of America, a new nation formed from ex-British colonies, was written. It incorporated these words from the Declaration of Independence (from Britain) in 1776: 'That all men are created equal, that they are endowed by their Creator with certain inalienable rights—life, liberty and the pursuit of happiness—that to secure these rights, governments are instituted among men'.

The concept that governments came from the people, and for their benefit, was a revolutionary thought that had been

developed in the writings of John Locke (1632–1704). The American Constitution was soon followed by the first of many French Constitutions proclaiming the Rights of Man and the Citizen. 'Men are born free and equal in rights' it proclaimed. Men, and later women too, would elect their representatives to parliaments in ever increasing numbers.

Representative democracy emphasises the need for representatives to reflect the needs and interests of their constituents. Some have argued that after their election the representative should become a person of independent judgement and consider the matters before the parliamentary assembly solely on their merits. Edmund Burke (1729–97), the notable conservative political theorist and parliamentarian, took this stance, and also argued for the pre-eminence of tradition in government. He said 'The state becomes a partnership not only between those who are living, but between those who are living and those who are dead'.

Representative democracy is synonymous with parliamentary democracy although the executive members elected in clubs and societies carry on the governance of those organisations as representatives. Although the franchise has been extended in Australia to include all citizens over the age of 18 years it is increasingly discussed whether this age limit should be lowered to 16 years.

The principle of representation by itself does not determine the nature of the government. Other terms are used to describe the distinctive character or style of representative democracies.

Background document 2

Liberal democracy

Liberal democracy is based on four main principles:

- a belief in the individual, based on the idea that the individual is both moral and rational, and the need to maximise the freedom of the individual;
- a belief in reason and progress, based on the belief that growth and development are the natural condition of mankind;
- a consensual theory of society based on the desire for order and co-operation; and
- a suspicion of concentrated forms of power, whether by individuals, groups or governments.

The main characteristics or tendencies of liberal democracies include:

- attempts to defend or increase civil liberties against the encroachments of governments, institutions and powerful forces in society;
- restriction or regulation of government intervention in political, economic and moral matters;
- increasing the scope for religious, political and intellectual freedoms of citizens;
- questioning the demands made by vested interest groups seeking special privileges;
- developing a society open to talent and which rewards merit rather than rank, privilege or status; and
- framing rules which maximise the well-being of all or most citizens.

Social democracy

Social democracy has been described as the desire for an equal and classless society and has been a phenomenon of the last century. Unlike liberal democrats, social democrats maintain that the individual is not as important as the whole society and argue that individuals may have to live with restrictions on their freedom for the overall good of society, particularly its minorities and disadvantaged groups.

Participation is one expression of social democracy. The franchise in these systems had been expanded to all men, women and youths from the age of 18 years. Apart from elections, social democracies try to maximise participation by consultation and openness of government. Another feature is the preoccupation with social equality and with ways of attaining it through social services, expanded government education systems and government legislation.

Background document 3

Governments of the World

There are many government systems which have existed and currently exist in the world. How democratic are they? Here's a checklist.

☐ **REPUBLIC**

—usually the head of state is a president and there are elected houses of parliament. Some examples are Switzerland, United States of America, India, Ireland, Greece and Israel. However, some republics are not democratic and may be led by an unelected head of state and not have either elected parliaments or an independent legal system.

☐ **ABSOLUTE MONARCHY**

—as in England prior to the Puritan revolution of 1640, France prior to the 1789 revolution, or Russia prior to 1917, Japan to 1945.

☐ **CONSTITUTIONAL MONARCHY**

—where the monarch is hereditary, and not elected, but has its powers limited by a constitution and/or constitutional conventions. E.g. Great Britain, Australia, Spain, Norway and Sweden.

☐ **DICTATORSHIP**

—where the majority of people do not have a say in who governs and where power is held by one person or a minority e.g. Paraguay under Alfredo Stroesner, Germany under Hitler, Italy under Mussolini and Chile under General Pinochet.

☐ **THEOCRACY**

—where the rulers are religious leaders.

☐ **PLUTOCRACY**

—where political leaders are drawn from the wealthy.

☐ **OLIGARCHY**

—where the rulers are drawn from a closed group. Traditionally this was the aristocracy whose property base was protected by hereditary rights.

☐ **GERONTOCRACY**

—where the rulers are drawn from the oldest citizens.

☐ **COMMUNISM**

—where the government is controlled in the name of the working class; a 'dictatorship of the proletariat'. The famous historical cases are Russia and China although currently China, North Korea, Cuba and Vietnam are the only contemporary communist states.

Note: Sometimes governments are not distinct, but draw elements from two or more of these forms. For example, an absolute monarchy may be difficult to distinguish from a military government if the monarch is the military commander of the country and uses the army to maintain control. For example, Russia prior to the revolution of 1905. Also North Korea, though once communist is now effectively a dictatorship.

Background document 4

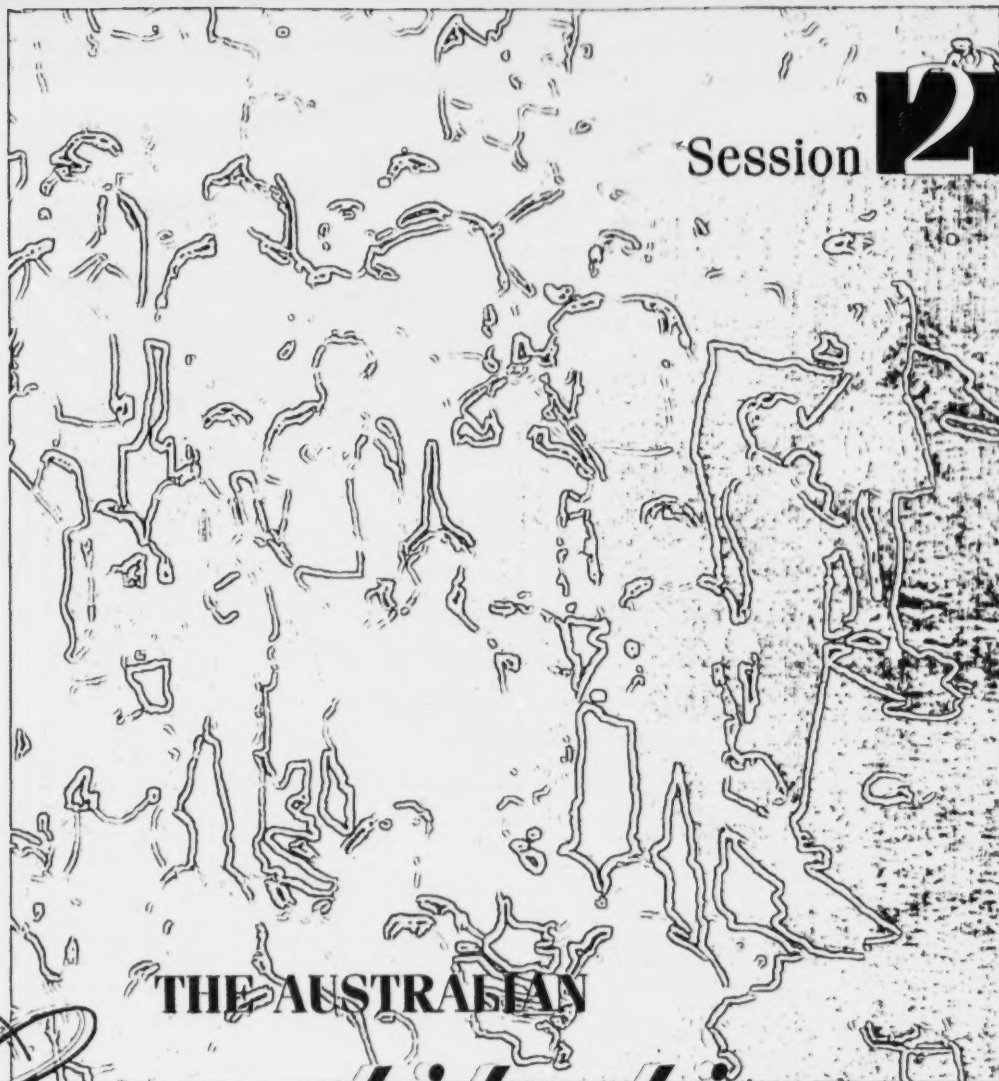
Features of Democratic Societies and Governments

- the universal right to vote for representatives and leaders;
- respect for a majority vote;
- accountability of government;
- absence of compulsion/repression;
- the availability of choice;
- redistribution arrangements to ensure that votes cast in different electorates are of approximately equal value ('One vote, one value');
- legal opposition within the system, both inside and outside parliament;
- freedom of speech;
- presence of/respect for legal rights (e.g. trial by jury, equality before the law);
- sovereignty of the people;
- a Constitution;
- freedom of movement and assembly;
- equality;
- freedom of the press;
- the rule of law;
- payment of members of parliament;
- payment of electoral costs;
- regular elections;
- secret ballot to avoid coercion;
- voting systems, such as proportional representation, which give fuller recognition of voter intentions; and
- accurate electoral rolls.



Session

2



THE AUSTRALIAN

Constitution

**BASIS FOR STABILITY OR
CONSTRAINT TO CHANGE?**

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45

The Governance of Australia ~ Kit 1

DISCOVERING
Democracy



This session deals with the document which is the basis of Australia's public governance—the Australian Constitution. Since it became law in 1901 it has provided and protected the framework and powers for the institutions of public governance (including the monarch and Governor-General), the procedures to be followed by those institutions and the division of powers in the federal system. It also details arrangements for financial relations between the Commonwealth and States, the formation of new States and alterations to itself by referendum.

Since it became law in 1901 it has provided and protected the framework and powers for the institutions of public governance ...and the procedures to be followed by those institutions and the division of powers in the federal system.

The Australian Constitution is not the only government constitution in Australia. Each of the six States has a constitution of its own, which provides a framework for the system of government of that State. The Northern Territory and Australian Capital Territory have Self-Government Acts which have the same function. All of these are subject to the Australian Constitution, and if not consistent with it, the Australian Constitution will prevail.

There are also many non-government constitutions in Australia which regulate the operation of simple groups like baby-sitting clubs and community organisations like Parents and Citizens' Associations and sporting clubs. Larger

The aims of the session:

- to consider generally the rules and constitutions of organisations and countries;
- to introduce the Australian Constitution and what it covers;
- to identify what is not included in the Constitution;
- to consider what you think it should cover;
- to look at how people can and have been involved in making changes to the Constitution, and
- to continue to develop the procedures and processes of the learning circle.

incorporated groups usually have more detailed constitutions or articles of association.

Within this web, all citizens will have encountered a constitution, which they may feel has benefited or hindered them. The experience of a local constitution can be relevant to understanding the Constitution of our Commonwealth.

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Suggested activities

Introduction	3
The Australian Constitution— A bird's-eye-view	5
What is not covered in the Constitution?	8
What do you think should be in the preamble to the Constitution?	10
Indigenous Australians and the Constitution	12
Is our Constitution democratic?	13
Do we need changes to the Constitution?	14
How can change happen?	16
End of session	17
Background document 1 Developing Australia's constitutions	18
Background document 2 Democracy and the Constitution	20

Resources

- *The Australian Constitution, 1997*, with annotations by Cheryl Saunders, CCF, Melbourne
- AEC brochure Constitutional Referendums
- AEC information sheet Simplified Constitutional Amendment Process
- *All You Ever Wanted to Know about Australian Democracy*
- *Round Table* (magazine of the Constitutional Centenary Foundation)—Spring 1996, No 1, 1997

(Note: Although not included amongst the resources in the kit, the Parliamentary Education Office kit *Your Future Your Say* (1998) is a good resource for those groups who wish to extend their learning in this area. A video and several folders of notes comprise the kit. It may be available from your local school or public library or you can buy it for \$199.00 plus \$10 p&h from Educational Media Australia, 7 Martin St, South Melbourne, Victoria, 3205. Unit 1—*The Constitution—What Is It?* includes a detailed simulation which could be the subject of a separate meeting—or more!)

• Introduction

Constitutions are the highest law of any organisation or country. They provide the rules to regulate the way people and groups in the organisation or country can behave. But they are not just a legal document. They are a formula for sharing power. Constitutions define the roles and responsibilities of various individuals and institutions and the powers they can exercise.

Constitutions are the highest law of any organisation or country. They provide the rules to regulate the way people and groups in the organisation or country can behave.

The constitutions of community organisations or clubs are sometimes quite detailed and precise. Those for countries may be more general. There is a range of reasons for this:

- they allow for laws to be created by the governments they establish;
- the constitution of a country is generally intended to last a long time, and
- a constitution needs to be flexible enough to grow and change as the country grows and develops.

Constitutions are intended to provide the foundations for a society. They need to be stable like the foundations of a house. To ensure political and social stability constitutions are often quite difficult to change. However, the world doesn't stand still, so governments need flexible powers to respond to new challenges and demands.

In a democracy, it is the people and the politicians they elect to represent them that have the key role of deciding how particular issues will be approached. The constitution provides the framework in which they do this. Also, it sets certain boundaries or limits. If it prescribed the detail of, say, rates of taxation or the structure of our social security system, it would take away much of the decision making power from people and the governments they elect. But if a constitution is too general, it can be hard to agree on what it means. This can lead to endless debate and division. Getting balance between certainty and stability and the flexibility to accommodate change is not easy!

Sometimes, even foundations need to be changed to cope with new circumstances. You might add on a room as the family grows, but sometimes, new demands require a totally new house.

A constitution is a legal document—the most important in the country, yet it is open to interpretation and change, although this procedure is complex in Australia. Just as the Australian Constitution was approved by the citizens of the six colonies voting in a referendum, its wording can only be changed by a referendum of all voters.

Some countries have constitutions that can be changed by laws enacted by the parliament, but other countries are more restrictive. Great Britain does not have a written constitution expressed in a

Constitutions... need to be stable like the foundations of a house

single document, but relies on hundreds of parliamentary acts (statute law) and conventions (common law) for its governance. The Australian States have constitutions which, largely, can be amended by their parliaments, although Western Australia, Queensland and South Australia can only amend those sections of their constitutions relating to their governors/heads of state after approval by a State referendum.

The Australian Constitution is interpreted by the High Court of Australia (see Session 5) and this can mean that through a High Court judgement actions may become legal or illegal because of the interpretation of the Constitution rather than after its wording has been changed after a successful Constitutional referendum. There have been more changes in interpretation than formal changes to the Australian Constitution.

This session looks at a variety of issues associated with Australia's Constitution—what it covers, what you think it should cover and how people have been involved in making changes to it. You won't be able to get through all of the issues in one session, so focus on those things your group is most interested in.

Activity:

List on a black/white board or butcher's paper some of the organisations of which you are members (e.g. sports clubs, professional organisations, unions, political parties and community associations).

Do you know if they have constitutions? Have you read them? What kinds of things do they cover? Have you ever been involved in debates about the meaning of a particular part of an organisation's constitution? Have you ever been involved in discussions about changing an organisation's constitution? Has a constitution been used to resolve a crisis in your organisation? Do organisations need constitutions?

Optional extra activity:

Between now and the next session, arrange a meeting with an office holder in one of the organisations of which you are a member. Look at the organisation's constitution. Talk with them about whether they have experienced any problems with the constitution. Has it become outdated? How can it be changed? Ask them about ways in which they have used the rules in the constitution to help them achieve particular objectives, such as setting a new direction for the organisation, or getting control of a key committee. Alternatively, has it stopped new initiatives in the organisation?

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• The Australian Constitution— a bird's-eye-view

The Australian Constitution embodied four great constitutional principles: representative government, federalism, the separation of powers, and responsible government under the Crown. Much of the uncertainty surrounding federal executive power in Australia stems from the contradictions inherent in the simultaneous operation of the British and American principles.

George Winterton (1983) *Parliament, the Executive and the Governor-General* p.1.

The Australian Constitution is best understood as an election policy speech. It is the product of a political compromise and was drafted with the electorate in mind. Like a policy speech, it tries to reconcile the irreconcilable. Like a policy speech it is vague and contradicts itself. Like a policy speech it provides 'answers' which, on inspection, are not answers at all, but simple deferrals of the problem until after the election, (or, in this case, after the federation referendums).

Richard Lucy (1993) *The Australian Form of Government*, p. 270.

The proclamation of the Australian Constitution on 1 January 1901 was the culmination of a federation movement that took two decades to achieve its goal. Such was the uneven progress of this movement and the rivalry between the colonies in that time that Alfred Deakin, a leading Victorian federationist claimed that federation has been finally achieved only by 'a series of miracles'. Details of this fascinating Australian story are in the Background document 1 (p 18).

The Commonwealth of Australia Constitution Act comprises a preamble, eight covering clauses, the Australian (Commonwealth) Constitution of 128 sections and a schedule which details the oath or affirmation that members of the Commonwealth Parliament are required to take by section 42. These sections are divided into eight chapters:

Chapter I	The Parliament
Chapter II	The Executive Government
Chapter III	The Judicature
Chapter IV	Finance and Trade
Chapter V	The States
Chapter VI	New States
Chapter VII	Miscellaneous
Chapter VIII	Alteration of the Constitution

(Note: Take this opportunity to look at the Australian Constitution as a complete document. There is a copy included in the kit, but it is also available from bookshops, your local library and many web sites including <http://www.nla.gov.au/oz/gov/>)

Our Constitution serves two main purposes. It established a national Australian Government where none existed before. Also, it established a federal system with powers shared between the new Commonwealth Government and the State Governments, and determined how they would relate to one another.

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The Australian Constitution

The pre-existing elements

- The Constitution recognised the six Australian colonies as they were in 1900, including their constitutions, laws and governmental arrangements (except where expressly changed by the Constitution). From 1901 they became known as States and the Australian Constitution guaranteed their continuing existence.
- Continuing recognition of the British monarch.

The new elements

- A Commonwealth Parliament of two houses with specific powers and functions (Sections 51 and 52 set out the key powers).
- A federal Executive Government, to be supported by federal government departments.
- A federal court system, with the High Court at the top with the power to interpret the Constitution.
- The establishment of the position of Governor-General as the Queen's representative in the Commonwealth of Australia.

How they fit together...

The Constitution:

- regulates relations between the Commonwealth and the States. For example, it provides for free trade between the States, and gives the Commonwealth sole responsibility for customs and excise and provides for financial relations between the Commonwealth and the States.

...and how the Constitution can be changed.

- The Constitution specifies how it can be amended and how new States can be created and admitted. Section 128 says that the Constitution can only be changed by a referendum of all electors in all States and Territories at which an overall majority of electors and a majority of electors in a majority of states must support the proposal which has already passed the Commonwealth Parliament.

Key players

Apart from establishing how the States and Commonwealth would share power between them, the Constitution also sets out the roles of the key individuals and institutions that make up the Commonwealth government.

- a Governor-General to be appointed by the Queen (Queen Victoria in 1901) and her heirs and successors who 'may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him' (Section 2). However each State had and would keep its own Governor; and
- a Federal Executive Council which would be the executive government and would comprise Ministers of State chosen by the Governor-General. (In effect, the Prime Minister and cabinet, although these terms do not appear in the Constitution).

Key institutions

- a Parliament made up of two parts or 'houses';
- a House of Representatives, whose size would be determined by population;

- a Senate, half the size of the lower house, with equal numbers of members from each State and having power to review the legislation of the other ('lower') house;
- the High Court would be the senior Australian court with regard to constitutional matters but appeals to the British Privy Council about other matters were possible until 1986; and
- existing Supreme Courts in each State would continue to interpret and enforce State laws.

The rights of Australian citizens

- the right to vote in elections of members of both Houses of Commonwealth Parliament on the same basis as voting rights for the lower houses of each State, although these may not be uniform;
- the right to stand for Parliament;
- Section 117 prohibits the Parliament of a State from discriminating against non-residents of that State;
- British subjects would be citizens of the new Commonwealth of Australia;
- the right to religious freedom;
- trial by jury in serious criminal cases; and
- acquisition of property by the Commonwealth must be 'on just terms'.

Activity:

How does all this fit together?! Look at the booklet *All You Wanted to Know About Australian Democracy*, Australian Electoral Commission, pages 3–4.

Are the separate parts of the machinery of government clear? (Maybe you would like to sketch this for yourself!).

Would you make any changes?

What image does the cartoon convey?

Should it include the influences of government not mentioned in the Constitution—like the media, pressure groups and foreign governments and corporations?

Do you think such a system does produce democratic government for the nation?

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• What is not covered in the Constitution?

The Australian Constitution does not address itself at all to some matters which are part of our governance. Sometimes this was because its founding fathers saw tradition and convention as determining these things. Also, because the Constitution was a compromise between competing colonies and their politicians, they made only vague and general references to the subjects they could not agree upon. However, some items should perhaps have more specific treatment, especially as conventions and traditions may change. Also the fact that the Constitution is nearly 100 years old has meant that there have been new developments which were not foreseen prior to 1901. Finally there were many transition provisions which were superseded once the new Commonwealth Parliament had made laws to deal with these areas.

Because the conventions of the Westminster system were assumed knowledge amongst the Constitution makers, the Australian Constitution does not mention the Prime Minister or Cabinet. Edmund Barton commented that to write these conventions into the Constitution would imply that the Australians did not know how the 'Mother of Parliaments' in Westminster operated!

Also the fundamental doctrine of the 'separation of powers', which is central to the Constitution of the United States of America, is not specifically mentioned in the Australian Constitution. However, the separation of the legislature, executive and judiciary into three separate chapters of the Constitution shows that it is an important convention in our system. However these areas are not completely separate as the Executive is drawn from the legislature (see Session 4) and the Executive

determines the appointment of High Court justices (see Session 5).

Also, the third sphere of government, local government, is not mentioned in the Constitution. It is argued that this is a deficiency as almost all of Australia is now incorporated into local government areas which are governed by democratically elected representatives. These local councils receive funds from both Commonwealth and State Governments as well as raising revenue by land rates and service charges. Attempts to include the recognition of local government in the Australian Constitution by referendum in 1974 and 1988 both failed.

Discussion:

Should the Australian Constitution include references to the Prime Minister and Cabinet, some or all of the conventions mentioned above and local government?

Do you remember the debate on the proposals to amend the Constitution to include local government? Can you explain it to those who do not?

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Case study:

The Australian Constitution and the Declaration of War

Australia's periods of greatest social and political turmoil, apart from the Great Depression of the 1930s, were in two wars—the First World War and the Vietnam War. During the First World War, two bitterly fought plebiscites were conducted about conscription of men for overseas service, although conscription for domestic service had existed since 1911. During the Vietnam War there was great division in Australian society about support for the war effort, which led to the biggest demonstrations in Australian history. Yet Australia was involved in both of these wars as a result of executive decisions in Cabinet followed by an announcement by the Prime Minister in Parliament.

In 1939 the Prime Minister, Robert Menzies broadcast to Australians that 'It is my melancholy duty to inform you that as Great Britain is at war with Germany, consequently Australia is also at war'. In 1965 the same Prime Minister announced to the House of Representatives that Australia would commit combat troops to the Vietnam War and both Prime Ministers Hawke and Howard committed troops to war against Iraq on the basis of a Cabinet decision.

Parliament was not regarded by the Constitution framers as the place for discussion of these matters and the Australian Constitution has no reference at all to the declaration of war. This was because the declaration of war was viewed as one of the historical prerogative powers of the Crown which, under the Westminster system, had devolved to the executive, embodied no longer by the Crown but by the Prime Minister.

The Australian Constitution does, however, cover some defence and military issues:

- Section 51 which specifies Parliament's power to make laws for 'the peace, order, and good government of the Commonwealth', refers, in Section (vi) to the Commonwealth's power to

pass laws for the 'naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth';

- Section 51 (xxxii) empowers the Parliament to make laws for 'The control of railways with respect to transport for the naval and military purposes of the Commonwealth';
- Section 114 disallows any States, without the consent of the Parliament of the Commonwealth to 'raise or maintain any naval or military force';
- Section 119 says the 'Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'; and
- Section 68 says the 'command-in-chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'.

Discussion:

The role of the military and the power to command it, raises some interesting issues.

- Should the power to declare war be covered in the Constitution?
- Who should have the power to make that decision?
- Under what circumstances?
- Should Parliament be involved?

Have you noticed other areas of Commonwealth Government power which are not included in the Constitution?

• What do you think should be included in the preamble to the Constitution?

If a constitution provides the foundations of a country, what should it contain in its preamble? This introduction to a constitution has been called the 'lymph gland' of a constitution. Should it say something about a country's beliefs about itself? Should it include the underlying principles to which it is committed? These may be representative democracy, free speech, equality between men and women or between different races and cultures, and the rights of indigenous inhabitants. What would be the benefits of this? What would be the disadvantages?

Another case study of constitution writing is that of the Northern Territory of Australia. In March–April 1998, a Statehood Convention was held in Darwin to consider the move from the status of Territory to State for this area. The constitutional questions, including the preamble, proposals and debates are all available from the Northern Territory Government's URL <http://www.nt.gov.au>.

Country case study:

Fiji

In 1996 the Fiji Constitution Review Commission considered these questions. Their report identified seven reasons for writing a new Constitution for the Republic of Fiji:

- to make a fresh start;
- to set out the conditions on which the people agree to be governed;
- to control the actions of governments;
- to guarantee the rights of individuals and groups;
- to promote important values;
- to act as an enduring basis for government; and
- to foster shared loyalty to the country and a sense of common purpose.

(From *The Fiji Islands: Towards a United Future*. Report of the Fiji Constitution Review Commission, 1996, Parliament of Fiji, Parliamentary Paper No. 34, pp. 24–28)

Country case study:

South Africa

Another example of a new constitution is that of the Republic of South Africa which was proclaimed on February 4 1997. Its preamble reads:

WE, the people of South Africa,

- recognise the injustices of our past;
- honour those who have suffered for justice and freedom in our land;
- respect those who have worked to build and develop our country, and
- believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

- heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law;
- improve the quality of life of all citizens and free the potential of each person, and
- build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

The Preamble to the Australian Constitution announces:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established'.

(Note: Western Australia had not voted in the federation referendum at this stage, but it did in 1900 and as a majority supported the proposal, Western Australia joined the federation as an original State on 1 January 1901).

Activity:

Look at the current Preamble to the Australian Constitution.

- Should it be kept, changed or completely scrapped in favour of a new Preamble?
- If you had the job of writing a new preamble for the Australian Constitution, would you want it to say what it means to be an Australian? Are there any specific principles, ideas or beliefs that you would include?

• Indigenous Australians and the Constitution

What is the position of Aboriginal and Torres Strait Islander people in relation to the Australian Constitution? The two references in the 1901 Constitution were in Section 51 (xxvi) and Section 127. The former empowered the Commonwealth to legislate for the 'people of any race, other than the Aboriginal race in any State, for whom it deemed necessary to make special laws'. Section 127 excluded Indigenous peoples from being counted in the census which was the basis for working out the number of House of Representative seats each State would get. Both of these provisions were repealed after a referendum in 1967, when 92 per cent of Australians rejected them. Although these changes removed all doubt about the inclusion of Aboriginal and Torres Strait Islander people as Australian citizens, should there be special, affirmative mentions in the Australian Constitution to assist Indigenous Australians to meet, as Pat Dodson has said, their 'yearning to escape the powerlessness of exclusion and dispossession'?

Father Frank Brennan proposed the following preamble to a 1993 conference.

'Whereas the territory of Australia has long been occupied by Aborigines and Torres Strait Islanders whose ancestors inhabited Australia for thousands of years before British settlement:

'And whereas many Aborigines and Torres Strait Islanders suffered dispossession and dispersal upon exclusion from their traditional lands by the authority of the Crown:

'And whereas the people of Australia now include Aborigines, Torres Strait Islanders, migrants and refugees from many nations, and their descendants seeking peace, freedom, equality and good government for all citizens under the law:

'And whereas the people of Australia drawn from diverse cultures and races have agreed to live in one indissoluble Federal Commonwealth under the Constitution established a century ago and approved with amendment by the will of the people of Australia: be it therefore enacted'.

Discussion:

Here are some things to consider:

- What do you think of this proposed preamble?
- Does it, by itself do enough to recognise Indigenous claims to recognition of prior occupation, of adequate representation and guarantees of human rights?
- Should the body of the Constitution be amended to include, as Justice Elizabeth Evatt has suggested 'ground rules to meet future aspirations' and allowance for 'room for autonomy in specific areas, such as customary law'?
- Would Indigenous and other Australian citizens benefit for the inclusion of a Bill of Rights in the Constitution?

For extra information of this area The Council for Aboriginal Reconciliation/Constitutional Centenary Foundation 1993 report *'The position of Indigenous people in national Constitutions'*, the CCF publication *'Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free, and Tolerant Australia'*, and the ATSIC Homepage (<http://www.atsic.gov.au>) would be good starting points (see References—Introductory Session p 12).

• Is our Constitution democratic?

Most Australians would claim that Australia is a democratic society with a democratic government. Does our Constitution reflect this assessment? Read through it—especially chapters I to III—and match this assessment with the provisions of the Constitution. (Note: The annotated version of the Australian Constitution included in the kit is useful here as the annotations explain each section).

A handbill examining the Draft of the Commonwealth of Australia Constitution Act, printed in 1900 expected the new Constitution to further the democratic cause. It is reproduced below:

If you need some more ideas have a look at Background document 2 (p 20).

Discussion:

Australia is a representative, parliamentary democracy. How much is this due to our Constitution? Drawing on the ideas covered in the first session, what do you think makes Australia a democracy? Are these things addressed in our Constitution? Should they be? Does it matter?

Is the Federal Constitution Democratic?

This Constitution is not only the most democratic of any existing Federal Constitution, whether we compare it with that of Switzerland, Canada, the United States, or Germany, but it is infinitely more democratic than the Constitution of any Australian Colony. It contains almost every democratic principle for which the Democrats of Australia have been striving for the last 40 years.

In no less than eight important points it is in advance of the present Victorian Constitution.

- Abolition of plural voting for both Houses.
- No property qualification for electors for the Senate.
- No property qualification for members of the Senate.
- Payment of members of the Senate.
- Power to dissolve the Senate.

- A remedy for deadlocks in the Federal Parliament.
- All Federal Ministers must sit in the Federal Parliament (save for a maximum period of three months). In Victoria, not more than four Ministers need be Members of Parliament.
- Every adult person who has now or who acquires at any time in the future a vote for the Assembly in Victoria or any other State, shall thereby have a vote for both Houses of the Federal Parliament.
- With such political machinery, the Democrats of South Australia, Victoria and New South Wales can command majorities in both Houses, and secure in the first Federal Parliament the passage of further democratic measures.

J. Haase, Printer, 17 Swanston St, Melbourne

(Reprinted from Dermody, K (1997) *A Nation at Last* AGPS Press, p. 54)

• Do we need changes to the Constitution?

The Australian Constitution was developed last century in order to federate six separate British colonies. It was written at a time when our population was around four million and overwhelmingly Anglo-Celtic. Although the Constitution has remained substantially unchanged it hasn't stopped Australia from developing and changing. Australia has passed legislation designed to prevent discrimination on the grounds of sex, race or disability. It has undertaken a huge immigration programme which has led to a multicultural country. It has expanded the quantity and range of its exports and increasingly integrated into the international community. Its population has grown to 18 million and has been involved in two world wars. The Constitution, although not specifically mentioning these things, has not prevented them. Some commentators would say these things have been achieved in spite of the Constitution.

Geoffrey Robertson, acclaimed human rights barrister and constitutional expert (and host of the ABC's series of *Hypotheticals*) says the Australian Constitution 'is really one of the world's worst. What worked in 1900 doesn't look sensible in 2000'. He wants change.

On this subject, the Rt Hon Gough Whitlam, lawyer and Labor Prime Minister from 1972 to 1975 when he was dismissed by the Governor-General Sir John Kerr after supply had been delayed by the Senate, has said:

We must be less concerned now with the obstacles which the Constitution places in the way of a reformist government and more concerned with its inadequacy as a guardian of fundamental liberties

and accepted parliamentary practices. It is true that the Constitution still presents obstacles to any reforming government; it is, after all, basically and self-evidently a conservative document, and as a general principle the Labor Party would support any amendments which augmented the federal Government's powers.

But that is no longer the over-riding priority. We know from Labor's three years in office that in framing its legislative program a Federal government can draw more widely on constitutional powers than governments have done in the past. Constitutional reform for Australian socialists has now other objectives: first, to entrench democratic safeguards in the electoral system and thereby promote the cause of liberty and justice; and secondly, to free Australia from the last relics of colonialism and enhance her status as a free and independent state.

EG Whitlam, 1997, *On Australia's Constitution*, Widescope International Publishers, Sydney

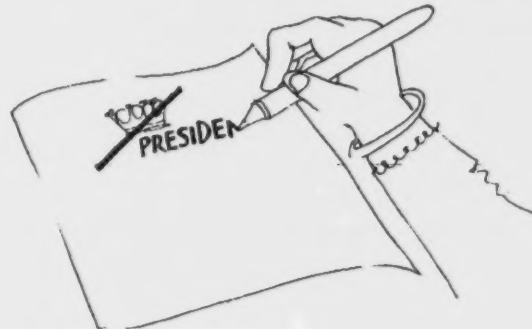
Others oppose any changes.

Mr Chairman and delegates, the question is: should Australia become a republic? The answer is an unequivocal and resolute no. As a first-generation native-born Australian, whose family came from a non-English speaking background in the late 1920s, I am grateful that my parents and grandparents were able to find in this country the peace and happiness that was denied to them in the land of their birth because of their religion. They turned their backs on a republic, and they chose the safety and security of this constitutional monarchy. I am not about to betray their memory.

We are told that we lack an Australian head of state, that we must get rid of the Governor-General and replace him with a president. But then we are told that the president would have exactly the same powers and exactly the same duties as the Governor-General has now—nothing would be added and nothing would be subtracted. One Australian would replace another Australian and do exactly the same job. All that would be changed would be the title on the letter-head.

It is time the republicans came clean. We have heard a great deal about the various types of republics we could have but not a single, credible reason why we should choose to have any one of them. The truth is that we are an independent nation and we have an Australian as a our head of state. There is no case for Australia to become a republic.

Sir David Smith, speaking at the Constitutional Convention, Old Parliament House, Canberra, 2 February 1998. He had read the proclamation to dissolve the Commonwealth Parliament on the steps of the same building on 11 November 1975 as secretary to the Governor-General



Activity:

Brainstorm the things you wish to see kept, deleted, changed or added to the Constitution. A scribe could make a four-column chart on white/blackboard or butcher's paper and write down the points as the group suggests them. Don't stop to discuss the points, just get them down.

When you have made your lists, talk about your ideas and whether there are common themes linking them together. What does your Australian Constitution look like? Does it differ from the existing Constitution?

Discussion:

Are there reasons to change our Constitution? What sort of changes would you like to see?

Do you think there is an argument for re-writing the Constitution in plain English, even if its provisions are not changed?

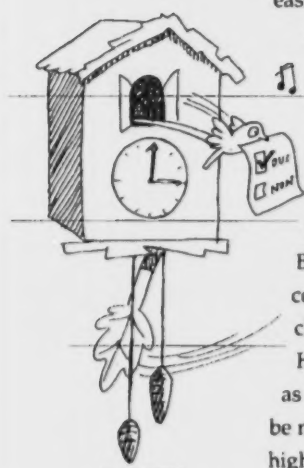
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• How can change happen?

Changing the Australian Constitution is not an easy process. This reflects the difficulties of bringing together the six colonies into a federation. The drafters of our Constitution didn't want their arrangements for balancing the powers between the Commonwealth and the States to be easily overturned. The small

colonies wanted to protect their interests against the more populous States and the new Commonwealth Government.

They chose to incorporate the Swiss practice of referendum which has no equivalent in the British system, where constitutional practice can be changed by an Act of Parliament. However, it could be argued that as constitutional change can only be made after a majority vote, it is highly democratic.



Section 128, Alteration of the Constitution, is the third longest section in all of the Constitution. It sets out the procedure for amending of the wording of the document and therefore Australia's highest law.

128. This Constitution shall not be altered except in the following manner:

The proposal for the alteration thereof must be passed by an absolute majority of each House of Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other house

rejects or fails to pass it...the Governor-General may submit the proposed law...to the electors in each State and Territory...

And if in a majority of the States a majority of electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration...effecting any one State...shall become law unless the majority of the electors voting in that State approve the proposed law.

The first constitutional amendment referendum, relating to Senate elections, was held in 1906 and it was carried in all states with 82.65 per cent of voters supporting the amendment. This was the greatest support for any referendum apart from the 1967 referendum regarding the status of Aborigines. Most referenda have failed and those of 1988 received only about a 35 per cent yes vote. Referenda have been held regularly from 1906 but of the 42 referenda for constitutional change only eight have been successful. The *Constitutional Referendums* brochure and *Australian Democracy Magazine* in the kit give a complete list.

Factors involved in the failure of so many referenda have been:

- the difficulty of achieving an overall majority of electors and a majority of States;
- concern about preserving States' rights against the central government;
- the party political lines along which referenda have generally been fought, has ensured that there is always significant opposition;

- the often complicated nature of the proposals to which electors vote 'no' out of suspicion; and
- the lack of clear and detailed impartial information about the question because the official information given to voters on referendum questions is in the form of a brief partisan 'yes' and 'no' case which tends to polarise community debate.

Discussion:

Try to recall referenda you have voted in. Were they successful or did they fail? What did you think at the time? Why have some referenda been successful and others failed? Would there be advantages to making our Constitution easier to change?

End of Session

At the end of the second session the group should be more comfortable with the learning circle process of co-operative learning.

The following are possible tasks:

- discuss whether any solutions to problems in Session One worked in this session;
- reflect on what has been achieved;
- are there other constitutional questions to be considered?
- is it time to plan for a visit from a speaker (e.g. Member of Parliament) or an excursion?
- what details have to be decided for the next meeting?
- check that everyone is getting to use the resource material from the kit; and
- distribute photocopies of Session Three discussion notes.

Next session: The Legislature

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Background document 1

Developing Australia's Constitutions

Each of our Australian States and the Commonwealth of Australia have Constitutions. The constitutional arrangements for the Australian Capital Territory and Northern Territory are included in their Self Government Acts.

New South Wales has the earliest Constitution (1842), which was later revised in the colony and authorised by the British authorities in 1856 under the British Act relating to self government for the Australian colonies of 1851. This first constitution established a Legislative Council with members who were nominated by the governor and elected on a restricted franchise to represent the different interests in the colony. In the debate surrounding the development of the 1856 NSW Constitution, W.C. Wentworth had argued for a nominated Upper House as he had 'no wish to sow the seeds of a future democracy'. The other colonies, apart from Western Australia, gained constitutions by the same process soon afterwards, and they were greeted by the white, male-dominated colonial societies of the day as democratic and progressive.

Australian Colonies—Commencement of self-Government:

Colony	Date
New South Wales	1855
Victoria	1855
Queensland	1859
Tasmania	1856
South Australia	1856
Western Australia	1890

Source: R.D. Lumb (1991)
The Constitutions of the Australian States,
 University of Queensland Press, St Lucia.

Many argued that the radical reform programme promoted in England by the Chartists from the 1830s (and for involvement in which many men were transported as convicts to the Australian colonies) had been achieved in the antipodes. They were secret ballot and male franchise, but payment of members of Parliament took some time to achieve and annual parliaments never became a practice in Australia. It was also felt that the forceful action of the diggers on the Australian goldfields, but especially at Ballarat where the Eureka Stockade was erected and bloodshed took place, had helped achieve these concessions from reluctant and autocratic colonial governors and the imperial, British authorities.

In contrast, the Constitution of the Commonwealth of Australia was not born of social turmoil and domestic bloodshed, although the shearing and maritime strikes, the birth of the Labor party and bank failures and depression of the early 1890s did usher in an eventful decade in Australia's history. The 1890s closed with the Australian colonies all sending contingents to the Boer War in South Africa, so the federation of the Australia was achieved while Australians were at war.

The Constitution of the Commonwealth of Australia was developed to overcome the problems of six independent and growing colonies co-existing in one continent and a wish to achieve a safe and prosperous nation. It aimed to consolidate the political rights which were guaranteed in the colonial Constitutions rather than extend them.

Background document 1

The exception to this was the extension of the franchise to all Australia women, for only women in South Australia and Western Australia had been able to vote before Federation was achieved on 1 January 1901.

The Australian Constitution was achieved after the long process of a Colonial Premiers' conference in 1883, the formation of a Federal Council in 1885 (to which all colonies did not always belong), and a series of constitutional conventions from 1890 to 1898. Although a complete Constitution was drafted by 1891 and finalised on the Queensland government ship, 'Lucinda', while sailing on the Hawkesbury River in New South Wales over the Easter break.

This convention agreed on five basic principles for the national system of government. The powers, privileges, and rights of the colonies would remain intact when they became States, except in the areas where they agreed to surrender power to the new national government, the provision of free trade between the colonies, the power to levy customs duties (the main tax of the Federal Government), the sharing of the revenue from this tax between the national and State Government, and the defence of Australia. They also discussed the problems which could occur in the function of Parliament. However, the colonial politicians who had been the sole representatives of the earlier conventions, lost their enthusiasm for Federation after 1891.

There were popular, or 'peoples' conventions in Corona in 1893 and Bathurst in 1896 which did not include politicians as delegates. The plan developed at Corona was accepted by the Colonial Premiers' meeting in Hobart in 1895 and then a final convention was held in Adelaide, Sydney and Melbourne in 1897-8. This consisted of delegates elected

by the voters of each colony and included a number of non-members of the colonial Parliaments. They considered many petitions and proposals from the wider population as the federation movement had become a widely discussed topic in the colonies and, the dispersal of the earlier constitutional meetings had touched most colonies.

They amended and endorsed the draft of the Constitution which had been prepared in the 1890-91 meetings, and agreed in Adelaide, the City of Churches, to the inclusion of the words 'humbly relying on the blessing of Almighty God' followed the opening words of the covering clauses of the Australian Constitution—'Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established'. Western Australians had still not decided about the entry of their colony into the Australian Commonwealth, but voted to do so in a referendum held on 31 July 1900.

This plan was submitted to two referenda in all the colonies between 1898 and 1900 and was eventually passed. The Australian Constitution was taken by a delegation to Great Britain where it became Clause 9 of the *United Kingdom Commonwealth of Australia Constitution Act (63 & 64 Vict.)* in 1900 after the right of appeal to the Privy Council of British subjects in Australia had been insisted upon by the British representatives.

Background document 2

Democracy and the Constitution

What seems democratic about the Australian Constitution?

Members of Parliament are directly elected by the people of the Commonwealth. The Electoral Act, enacted by the Commonwealth Parliament lays down the method of conducting elections, which include a secret ballot (by voluntary voting until 1925, although registration had been compulsory since 1911, and voting in referenda had been compulsory from 1915) and no property qualification for the franchise.

[Note: Several State upper houses were still elected until recently on a restricted male franchise due to property qualifications. E.g. In Victoria, the 'special franchise' for the Legislative Council was abolished in 1950 and adult suffrage substituted, and the same course was followed by Western Australia in 1964 and by Tasmania in 1968. South Australia abolished its 'special franchise' provisions for the Legislative Council in 1973. The New South Wales Legislative Council became directly elected from 1978. It had been appointed by the Governor until 1933 and then elected by both Houses of Parliament from 1934 to 1978.]

- Elections would be held frequently and Parliament would have to sit at least once a year, with its term limited to three years before another election must be called.
- Electorates for the House of Representative should have equal populations, thus ensuring 'one vote, one value'.
- Decisions in the Parliament would be decided by a majority vote (Sections 23 and 40).

- Members of Parliament would be paid (initially 400 pounds per annum) which would make it possible for any adult person without other income to be a member.
- Although not demanded by the Constitution, it was assumed by all that the practice of Parliament conducting its business in an open chamber would continue. This took place in Melbourne from 1901 to 1927, and since then in Canberra in the 'Temporary' Parliament House from 1927 to 1988 and since then in the 'New' Parliament House to which the media and public are admitted. It publishes a record of its debate in Hansard, usually available the next day (and now available on the Internet at: <http://www.aph.gov.au>).

Can you find any more?

What may not seem democratic about the Constitution?

- Ministers may be appointed, for up to three months, without being Members of Parliament.
- The Head of State is an hereditary monarch.
- The Governor-General is appointed, not elected, either by popular election or by the Parliament, and is not required to be an Australian under the Constitution.
- The less populous states have equal representation in the Senate.
- The quorums for the Senate and House of Representatives were set, until Parliament

Background document 2

- determined otherwise, at one-third of the membership of the houses (Sections 22 and 39). This followed British rather than American and European practice where a majority of the house constitutes a quorum (Note: The *Senate (Quorum) Act 1991 (Cth)* Section 3 now sets the quorum at one-quarter and the *House of Representatives (Quorum) Act 1989 (Cth)* Section 3 sets the quorum at one-fifth of the whole number of members).
- Although not specified in the Constitution, it is a constitutional convention that the proceedings of Parliament are public, but the proceedings of Cabinet are not.
 - Referenda are only used for constitutional amendments rather than to decide other Commonwealth legislation (as, for example, in Switzerland). However, although not mentioned in the Constitution, advisory referenda (also called plebiscites) have been held at Commonwealth and State/Territory levels but governments are not constitutionally bound by their results. For example, Commonwealth electors voted 'No' to military conscription in 1916 and 1917, electors of Western Australia voted to secede from the Commonwealth in 1933, electors of Queensland and Western Australia have voted in plebiscites on daylight saving, and Australians chose *Advance Australia Fair* in a national poll held on 21 May 1977.
 - Section 25 allows that numbers of any race of people, disenfranchised in any State, would not be included in calculating electorates for the Commonwealth Parliament.
 - The Governor-General, under Section 28 of the Constitution, and, in practice, on the advice and to the advantage of the Prime Minister, may dissolve Parliament sooner than the full three year term which is mentioned earlier in this section of the Constitution.

Can you find any more?



Session

3

Parliament

THE LEGISLATIVE BRANCH
OF GOVERNMENT

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67

DISCOVERING
Democracy

The Governance of Australia ~ Kit 1

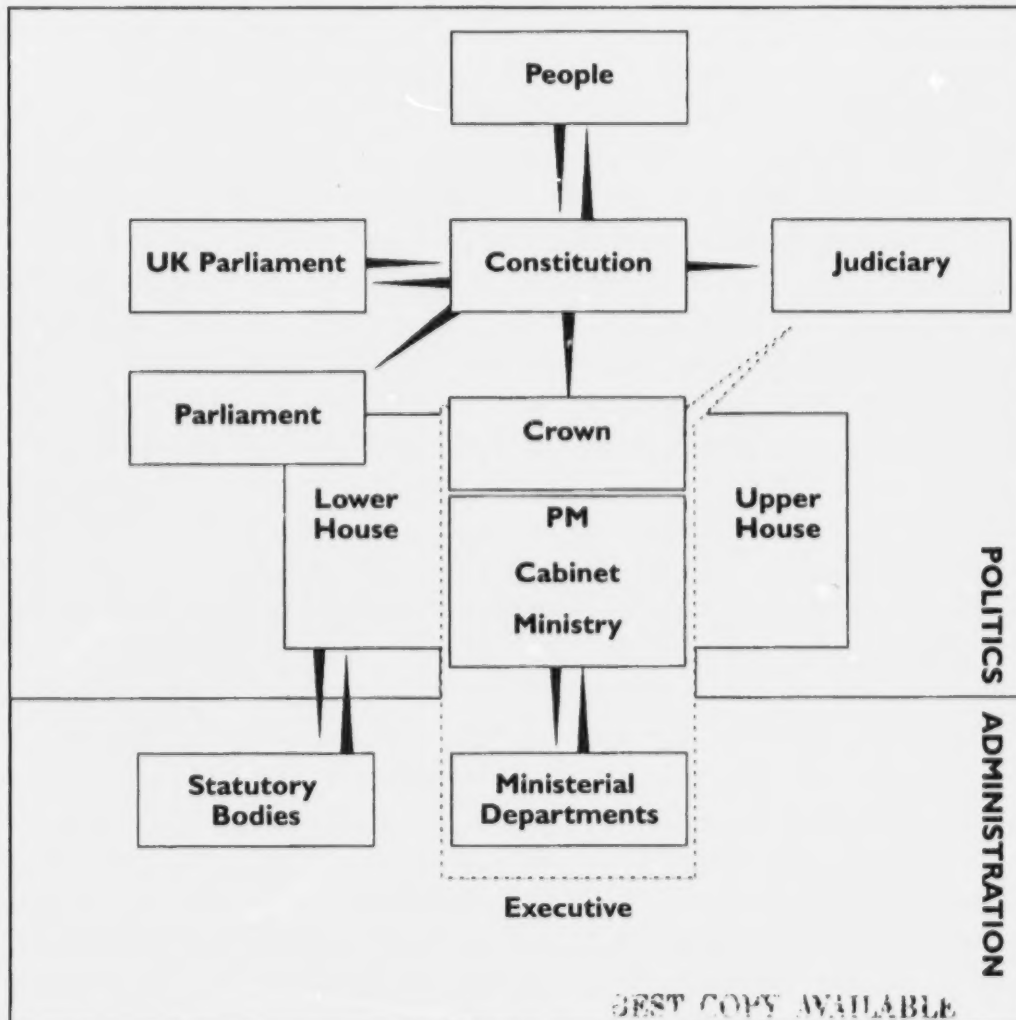


• Introduction

Politics is concerned with power: how it is exercised by individuals; how its exercise is structured in institutional arrangements and practices; and how the various sets of individuals and institutions exercising power interrelate with one another and with the larger subject society over which they rule.

Brian Galligan (1987) *Politics of the High Court*
UQP, St Lucia

The establishment of parliaments in medieval Europe and their continuing evolution, particularly in England and Scotland, provided a central idea and inspiration for the organisation of government in Britain and Australia. However, these institutions arose as opponents to the monarch and by the end of the 18th century had wrested effective power from them. In this process the sovereignty, which the monarch had originally claimed by divine right,



became the preserve of the Prime Minister, supported by his Cabinet. Where does this leave Parliament? The Australian Constitution empowers it to 'make laws for the peace, order, and good government of the Commonwealth.' How able is it to carry out this constitutional imperative?

Is it the central forum of public governance that its public role promotes? Is it a rubber stamp for the executive? Is it powerful, or subservient to the Prime Minister and the dominant political party or coalition? Is it playing an effective role within the current constitutional arrangements, or is there a need to reform Parliament and the way it is elected? Do you feel effectively represented in Parliament? What do you want your Parliament and parliamentary members to do?

This session encourages you to explore the area of governance that everyone has an opinion about—Parliament and politicians.

Suggested activities

Perceptions of Parliament	4
Reform of the Parliament and the electoral system	6
The House of Representatives—parliamentary terms	8
Double dissolutions and joint sittings	10
Indigenous representation in Parliament	12
The Crown and Parliament	14
The Senate—the States' House or 'unrepresentative swill'?	15
The contemporary role of the Senate	16
The Senate and money bills	17
End of session	18

Background document 1

Extract from Parliament of Australia Joint Standing Committee on Electoral Matters Inquiry report—The 1996 Federal Election	19
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Background document 2

<i>Sun-Herald</i> poll 1997	20
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Background document 3

The Commonwealth Budget 1995–96	21
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Resources

- *Australian Constitution* Ch I
- *Australian Democracy Magazine*
- Electoral Systems of Australia's Parliaments and Local Governments
- *Electoral Pocket Book*
- *All You Ever Wanted to Know about Australian Democracy...*
- *Powerful Choice* (video)
- *Making Laws*. Legal Studies Brief
- *Behind the Scenes*. The AEC's 1996 Federal Election report
- PNN Newsradio and television Commonwealth Parliamentary broadcast schedule

Preparation

If you feel you need to revise the basics of the Australian parliamentary system have a look at the resources listed above and read them before the session. *The Australian Democracy Magazine* and the *All You Ever Wanted to Know...* booklet include the basics.

Also, look at Chapter One of the Australian Constitution. It is the Chapter on the Parliament

(both House of Representative and the Senate) but does not go into many details of parliamentary procedure and practice. The video *Powerful Choice* examines the role of some members of Parliament and parliamentary procedure. You may wish to watch it as a group.

Finally, check to see if Parliament is mentioned in the media. (It may not be mentioned if parliament is not sitting at the time.) What issues are being reported? What parliamentary events do you remember being featured in the media recently?

For more information on the Commonwealth Parliament check its web site
<http://www.aph.gov.au>. State and territory parliaments have their own web sites.

Pre-session activity:

Use the resource material *The Electoral Handbook* and *Behind the Scenes* to find out which House of Representative electorate you vote in. Who are your members and senators? Which political parties are they from? Did you vote for them? Do you think they should have won their seats? Have you met them? Do you know how to contact your parliamentary representatives? Have you done so? With what results? Do you think the voting system is sound and fair (democratic)? Do you think you are well represented?

Researching and thinking about these questions before the session will give you plenty to talk about when your group gets together.

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• Perceptions of Parliament

Parliament and the election of members to it are the most public elements of Australian governance. Some would say that election day is the only day of democracy in the whole three-year term of governments because it is the only day in which all the people are directly involved. Another commentator sees Parliament as '...a symbol of a continuing democratic process that operates at all times, not only during election campaigns'.

The Parliament is the legislative branch of government; it makes legislation. It also provides the personnel for the Ministry and the Opposition. It deals with things dear to the hearts of most voters—the law and money. The Budget session is the most popular session of the Parliament and public interest also heightens when legislation to introduce controversial new laws is debated. (See Background document 3, p 21)

What are some of Parliament's characteristics?

Adversarial character

Because of the presence of the opposition and minor parties, the broadcasting of its proceedings and other media attention, it provides a forum where political conflict is most obvious. Question Time in the House of Representatives is the essence of this conflict and most scenes of Parliament for television news and current affairs are of Question Time. The traditional privileges of parliamentarians to be immune from the law for statements made in Parliament which would otherwise be libellous and defaming add an extra level of interest.

Many citizens deplore this strongly adversarial character of parliamentary proceedings. They claim too much time is spent attacking other members and senators, and the past records of parties in power; and not enough time is spent in thoughtful and open consideration of lessons from the past, and options for the future. Some citizens have experiences of wartime government based on national unity in Britain, and wonder why we cannot always choose the best of all our representatives, regardless of party, to lead the nation.

The Parliament is the legislative branch of government; it makes legislation...It deals with things dear to the hearts of most voters—the law and money.

The response is likely to be that such ideas are romantic nonsense. There are real differences of interests at stake—of core values, if no longer of class. History too provides a legacy of difference between and definition of political parties.

Moreover, we are more likely to get a good result if competing policies and programs are tested under fire. Question Time is a bear pit, but this is just the public tip of the parliamentary iceberg, which does include a huge volume of constructive, cooperative work as well as more private examination of legislation and performance through committees.

Women in Parliament

Some citizens particularly regret the lack of gender balance in Parliament. Although the number of women Members and Senators is gradually

increasing, they are still only 24.55 per cent of the Federal Parliament. The Australian Labor Party, with an affirmative action policy in relation to pre-selection of women candidates, has fewer women in the present Commonwealth Parliament than the Coalition parties. One view is that increasing the proportion of women in Parliament will produce a less combative, more cooperative parliamentary process, as well as being more democratic. Emily's List, an organisation to facilitate the election of Labor women to all parliaments in Australia, supplements the work of the Women's Electoral Lobby and Women's Party in this area.

Need for expertise

Others fear that parliamentarians are no longer adequately equipped to deal with the extraordinary complexity and speciality of affairs of state; environmental issues such as regulation of 'greenhouse gases' and protection of biodiversity; ethical issues such as cloning or euthanasia; legal matters such as preventing abuse of the Internet, and so on. This leads some to conclude that there should be a formal role for chosen specialists within the parliamentary system.

A 'rubber stamp'?

Some feel that Parliament has become a 'rubber stamp'. The legislature is now the captive of a disciplined party system, of which the Constitution makes no mention. Although legislation has to go through an extensive process of first, second and third readings in both houses, these stages are often rushed and cut short by using the guillotine motion. Ultimately governments know that in any division (vote) their majority in the house will deliver a supporting vote, regardless of criticisms of the measure by the opposition. It is often speculated that even backbenchers of the governing party often feel left out of the governing process as their party leadership, comprising the Cabinet, determines policy and is not required to consult with them. Thus the Parliament can be regarded as a rubber stamp of the decisions of the executive.

Activity:

Spend ten or 15 minutes drawing up a 'balance sheet' of the good points and bad points about the structures and processes of our parliaments. You might like to use a third column—interesting or undecided—and discuss whether they should be listed with the positive or negative aspects.

Discussion:

Do we get the politicians and Parliaments we deserve? What do you feel about the way in which the Australian Parliament works today?

Do you think it would it make a difference if half of our parliamentarians were women? If so, why?

Too remote?

Some feel that parliaments, and the executive governments that control them, have drifted too far from the democratic deals of 'government of the people, for the people, by the people', and that radical new measures of citizen empowerment are needed to revitalise our democratic system. Hence proposals for citizen initiated referenda (CIR), arrangements for constituents to recall representatives through recall elections and electronic democracy have been suggested.

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† based on Senate figures July 1999

• Reform of the Parliament and electoral system

A contemporary criticism is the excessive domination of Parliament (especially the House of Representatives) by the Executive Government (see Session 5).

Harry Evans, Clerk of the Senate, presenting his address 'Bad King John and the Australian Constitution (Commemorating the 700th Anniversary of the 1297 issue of Magna Carta)' in the Senate Department Occasional Lecture 17 October 1997 said:

Perhaps because of our convict origins, when we started with governors possessing absolute powers, we do not have a great understanding of the virtues of limiting governments and putting safeguards between the state and the citizen. We tend to think that, provided that governments are democratically elected, they should be able to do anything. In short, we do not have a strong tradition of constitutionalism properly so called. Our version of the so-called Westminster system encourages our leaders to think that, once they have foxed 40 per cent of the electorate at an election, they have the country by the throat. Our prime ministers and premiers are averse to being told that anything is beyond their lawful powers, and are angered by restraints applied by upper houses or judges. They frequently behave in ways that make King John and Charles I seem moderate by comparison. When they have majorities in both houses of Parliament they become more like those monarch's eastern contemporaries.

Others have suggested limiting the term of Prime Ministers and even members to two terms of office.

Geoffery Bolton has suggested having a group of appointed members who would bring special skills to the Parliament and ministry:

It is often complained that the necessity of fighting elections, of fashioning an acceptable media image, of obeying tight party discipline discourages many well-qualified citizens from entering the public arena. The remedy for this might be to provide that in addition to the members elected to the lower house of parliament—either State or federal—provision should be made for the nomination of a number of members equal to up to 10 per cent of the whole. Such members should hold office for the life of one parliament, though eligible for renomination, and should be able to speak and vote on all matters except motions of no confidence. In this way people with special competencies could be appointed to the ministry—a successful business executive, for instance, or a respected authority on women's issues.

(The Australian, 15 October 1997)

In fact this is constitutionally possible. Section 64 of the Constitution says 'After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a Member of the House of Representatives.' Apart from the technicality that such a person may be re-appointed for further periods of three months without winning a seat and continuing their incumbency of a ministry indefinitely, this provision has not been used, with one exception. When Prime Minister John Gorton resigned his seat in the Senate to seek election to Harold Holt's prior seat in the House of Representatives, Australia had a Prime Minister who was not even a member of Parliament! As it has not been used regularly, maybe this section should be removed from the Constitution.

Some other suggestions for parliamentary reform:

- changing the electoral system so that the Parliament sufficiently represents the diverse Australian society;
- establish a more extensive parliamentary committee system to examine legislation, with public consultation;
- abolish members' privileges of expression in parliament;
- provide for the representation of Indigenous people in reserved seats;
- enhance the role of the Senate as a house of legislative review and citizen consultation;
- abolish the Senate to streamline the legislative process;
- change the voting system of the lower house to proportional representation;
- abolish compulsory voting;
- fix terms for the House of Representatives and therefore fix election dates;
- provide for longer terms of Parliament; and
- shorten the term of Senators from six years to the same as that of Members of the House of Representatives.

Two particular areas of possible reform—parliamentary terms, and representation of Indigenous people—are dealt with in more detail. However, you may wish to discuss some of the others.

The case against some of these reforms is that the Government needs control of the Parliament to get through a lot of legislation required to run an increasingly complex society, and that any review of Commonwealth legislation that is necessary is provided by the High Court, which ensures that legislation is lawful and within the Constitution (see Session 5).

The basic problem of bringing about parliamentary reform is that it would have to be legislated for by the Government, which has control of the House, and they would not want to make it any less easy for a government to control Parliament. The Opposition as 'a government in waiting' would not necessarily support such changes. However, in Australia there is a long history of parties having a particular view while in opposition but then failing to implement that position or view when in government.

Activity / discussion:

Do members of the group have other suggestions for improving the effectiveness of Parliament? List all your suggestions.

If as a group you had the power to introduce one reform of Parliament, what would it be?

Optional extra activities:

Contact and arrange to interview a local member, or a retired member of Parliament. Ask them what reforms they would most like to be able to make to ways in which Parliament works, and why.

Alternatively, invite them to come and meet with the group to give their views on the most positive, and the most negative aspects of parliamentary processes.

Consider visiting a parliament, or, as a group, listening to or watching a live broadcast or watching a video recording of Parliament. This will reveal a different situation to a 'sound bite' from question time shown on TV.

• The House of Representatives—parliamentary terms

Section 28 of the Constitution simply states that 'Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may sooner be dissolved by the Governor-General.' As the Governor-General is bound by convention to take the advice of his advisers in the Federal Executive Council (the Prime Minister and Cabinet) this section gives great power to the government to determine the most favourable time for an election.

There have been two main suggestions for reform:

- that the maximum term should be increased to four years (as is the case in some States), or longer; and
- that the term of the House of Representatives should be fixed, or partly-fixed to allow an election to only be called in the last months or weeks of a prescribed term.

Four year terms—or longer

Many observers and participants are critical of three-year terms of Parliament. It is argued that the first year is spent settling in to government after an election, the second year is spent doing something, and the last year is spent getting ready to fight another election. When a government has a slim majority or weak leadership the period for action is even further reduced. Yet the principles of democracy suggest that elections should be more rather than less frequent. In the USA, House of Representative members are elected for two-year terms. In fact, last century the Chartists campaigned in England for annual elections. Ironically, the British government has a five year term.

In 1988 Australian voters rejected a referendum proposal to provide for four-year maximum terms for members of both houses of the Commonwealth Parliament.

Some arguments in favour of longer terms:

- three years is too short for strong decision making and long-term planning;
- the link to half-senate elections could be maintained by increasing the term of Senators to eight years; and
- extending the term of the House to four years would not prevent the introduction of a fixed or partly-fixed term.

Some arguments against:

- in the interests of democracy, three years is long enough between elections;
- it would be better if Parliaments served their full term, rather than extending the limits of the term; and
- if the term of the House was extended it would be too difficult to work out what to do with Senate elections. All options for change to the terms of Senators make them too weak or too strong.

Discussion:

Would we get better government by giving governments longer or shorter terms?

Fixed terms

Under Section 28 the maximum term of the House of Representatives, and therefore a federal government, is three years. However, as the Governor-General is advised by the Prime Minister when the House should be dissolved, the term may be shorter. Convention also allows the Governor-General to dissolve the House without the Prime Minister's advice if the Prime Minister has lost the support of the majority of the House. In that situation the Governor-General would also withdraw the Prime Minister's commission.

Arguments in favour of fixed terms:

- there is no reason why the Prime Minister should enjoy the advantage of being able to decide when to call an election;
- if any flexibility is needed, it could be provided by leaving the Prime Minister some discretion in the final year of the term;
- a fixed term for the House of Representatives means that Senate terms could be set at two terms of the House without risk to the independence of the Senate;
- a fixed three-year term would make a maximum four-year term unnecessary;
- fixed terms have already been introduced in some States; and
- elections are expensive and should be held as infrequently as possible.

Some arguments against:

- governments will not dissolve the House early because they fear an electoral backlash; and
- governments need the power to adjust the timings of elections in order to address new developments of national importance.

Discussion:

Should parliamentary terms be of fixed duration, depriving the incumbent government of the power to choose when to 'go to the people'?

It has been suggested, for example, that all elections (Federal and State) be held on the first Saturday of December in each Olympic Games year.



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• Double dissolutions and joint sittings

The provision for double dissolution to resolve legislative deadlocks is provided for in Section 57 of the Australian Constitution. It was first used in 1914 by Prime Minister Joseph Cook, and again in 1951, 1974, 1975, 1983 and 1987. Of these only 1974 was followed by a Joint Sitting of Parliament.

Section 57 says:

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives....

The section also explains the details of the joint sitting and that if the contested legislation passes the joint sitting, then it '...shall be presented to the Governor-General for the Queen's assent.'

This complex section of the Constitution was designed to use an election to resolve constitutional deadlocks between the two Commonwealth Houses of Parliament. The Founding Fathers assumed that such deadlocks would arise over issues between the popular lower house, which would have a majority of members from the populous states of New South Wales and Victoria and the Senate as the 'States' House' which would protect the interests of the less populous states. When democracy is seen to be a matter of numbers, the less populous States felt vulnerable. Ironically both houses became party houses soon after federation and legislative disputes which have lead to double dissolutions have arisen from the fact that the government of the day has not also controlled the Senate.

However, deciding to use an election—'the voice of the people'—to resolve such disputes (rather than invoking some constitutional or reserve power of the Governor-General) is a fundamentally democratic solution.

This rule, like all rules, invites people to bend or break it. If a government proposes legislation it knows to be unacceptable to a hostile Senate, it can set up a situation whereby it can hope to gain an electoral advantage by having a double dissolution, whereby all the seats of both houses of Parliament are declared vacant. In an ordinary general election, which the Prime Minister can advise at anytime, only half of the Senate seats are declared vacant along with all seats in the House of Representatives. This provision is a cause for uncertainty in our system of governance and can be used for party advantage.

Some opinions are:

'Decommission the double dissolution'

There are good reasons for abolishing double dissolutions [and joint sittings]... There are better ways of resolving differences between the houses... Instead if the Government gets returned at the next election it should be able to pass all the Bills that were rejected twice by the Senate in the previous Parliament by a simple majority on the House of Representatives. Let's face it, every government since World War II which had a majority in the House would have a majority in a joint sitting. So why go through the farce (as we did in 1974).

If double dissolutions were abandoned, all the trouble over the timing of subsequent elections would be avoided. The shorter terms would be avoided. The fringe groups getting a chance in the Senate would be avoided. Senators would have a fixed, secure term which would tend to force the Reps into a simultaneous three-yearly cycle.

The double dissolution is a wasteful... disruptive, unnecessary mechanism to resolve disputes between the Houses. Better to give the Senate the power to block Bills until the end of the term (a maximum of three years) and if the Government gets returned at the next ordinary election it should get its Bills through, despite the Senate and without a joint sitting.

And while we are at it, we should deprive the Senate of its power to reject Supply. Together, these changes would make our parliamentary terms much more stable.

Crispin Hull
The Canberra Times 7 March 1998

'Views on double dissolutions'

Over the past few months Crispin Hull has written several opinion pieces in the Canberra Times critical of the present double dissolution

arrangements of the Constitution.... Some of his assessments are correct but beside the point. For example it is likely that the Howard Government would be most unlikely to have a Senate majority if it proceeded to a normal half-Senate election.

He writes, 'An ordinary election presents a problem for the government. With an ordinary election only half the Senate retires. It is unlikely the Government would get a majority in the Senate'. Very well, but surely Mr Hull should have told us of the voting percentages at the 1996 Senate election. The Coalition had 44 per cent of the Senate vote, Labor 36, Democrats 11, Greens three and Others six. With such a miserable vote the Coalition never deserved to control the Senate. Yet every Bill for which it had a mandate was passed by the Senate. The trouble only arose when the Government decided to concoct disputes (in particular the introduction of the Workplace Relations Amendment Bill 1997) and refused to accept wholly reasonable Senate amendments to the Native Titles Amendment Bill 1997.

Finally, Mr Hull correctly describes certain provisions and then comments, 'These provisions are quite idiotic and unnecessary'. I beg to differ. I think the provisions in questions are excellent.

...if the Government is determined not to negotiate on any of these disputes, who can object to its decision to call an election where it is likely to win 42 per cent of seats for 42 per cent of votes?

Malcolm Mackerras
The Canberra Times 11 March 1998

Discussion:

Do you think the double dissolution and joint sitting arrangements in the Australian Constitution should be preserved, changed or deleted?

• Indigenous representation in Parliament

Apart from the issue of recognition in the Preamble to the Australian Constitution of prior Indigenous occupation of Australia, the question of whether there should be designated seats in the Commonwealth Parliament for Indigenous representatives—the so-called ‘two Nations’ model—has also been raised.

There have been two Indigenous representatives in the Commonwealth Parliament to date, both in the Senate. The first was Neville Bonner, who served as a Liberal Party Senator for Queensland from 1971 to 1983. The second, Senator Aden Ridgeway (Australian Democrats), has represented New South Wales since 1 July 1999.

The Parliament of New Zealand has had seats set aside for Maori representatives since 1867. Maori representatives have been elected from a separate electoral roll of Maori people. Since the change to proportional representation in New Zealand in 1993, many Maori voters have transferred their registration to the general rolls, because minorities can now gain representation in Parliament elected by proportional voting.

Consider these opinions:

The inclusion in the [1998 Constitutional] convention of Aboriginal representatives elected on an open, non-party and state-wide basis will be one of its most distinguishing and encouraging features. But it will also point to the obstacles to Indigenous candidates winning seats in Parliament from existing electorates [with existing electoral systems].

On a rough numerical rule of thumb, there should be much the same level of Aboriginal representation as there is from the ACT.

The Parliament of New Zealand has had seats set aside for Maori representatives since 1867

The territory and the Indigenous community both number about a quarter of a million people. Australia-wide, this might produce two members of Parliament and two senators....

It will be a tragic loss of opportunity if the convention is not brought to recommend Aboriginal representation in Parliament. It will be shameful if this national agenda item is left entirely to the Indigenous Constitutional Convention which the Aboriginal and Torres Strait Islander Commission is to mount independently in March [1998].

...Aboriginal Australians have a unique right to representation. Australia as a whole will benefit from granting that right, and will find it debilitating domestically, and damaging internationally, to withhold it much longer.

We remain reluctant and, frankly, prejudiced in not recognising this entitlement... That could be made good by bringing Aboriginal Australians permanently and independently into the national legislative system. It would be an act of inclusion and incorporation, not of apartheid.

The Aboriginal communities have inalienable historical and moral claims to be accorded a status in some ways superior to the status of other communities embraced in multicultural Australia.

The Westminster notion of the standing of a prime minister reflects the situation nicely—primus inter pares, or first amongst equals. In other words they should be accorded the status of a nation of and within the Australian nation.

Duncan Campbell
The Australian, 21 January 1998

First our Constitution said we could discriminate on the basis of race (White Australia), then the Parliament determined that we should not discriminate (anti-discrimination), then the constitutional meddlers suggested we must discriminate in favour of one race (the Hindmarsh debate), and now the full gamut of madness comes to light—Aborigines have a 'superior status' to other Australians [see above article].

Little do you understand, Duncan Campbell, the quiet anger building in the electorate, with people despairing at the proposition that one race is superior to another. 'First amongst equals', indeed.

How about we just leave it at equality?

Gary Johns, Senior Fellow, Institute of
Public Affairs, *The Australian*, 23 January 1998

Discussion:

The issue of Indigenous representation in Parliament is a complex one as it involves social as well as electoral questions. Do you think Aboriginals and Torres Strait Islanders should have guaranteed representation in the Commonwealth Parliament? Should they have a separate Parliament? Is the Aboriginal and Torres Strait Islander Council a sufficient representative body for this group?

If you don't have Aboriginal or Torres Strait Islander people in your learning circle, maybe you will need to ask one or more members of the group to explore the views of Indigenous people and their representative organisations, and report back to the group.

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• The Crown and Parliament

The longest chapter of the Australian Constitution deals with the Parliament, or legislative branch of government. Its first section says:

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called 'The Parliament,' or 'The Parliament of the Commonwealth'.

Apart from continuing the confusion of the interchangeable terms Federal and Commonwealth, this section indicates by its mere position in the Constitution the importance of both this branch of government and the traditional Westminster system concept of the supremacy of Parliament.

The present role of the Crown (exercised by the Governor-General of Australia) is to:

- select the leadership of Parliament by selecting ministers of state;
- dissolve Parliament when requested to do so by the Prime Minister and order the issue of writs for the election;
- open new sessions of Parliament (but only by attending a joint sitting in the Senate chamber to satisfy a British parliamentary tradition) and announce the government's program;
- give royal assent to parliamentary bills after they have passed both Houses of Parliament; and
- intervene in situations of constitutional crisis and exercise certain 'reserve powers', not written into the Constitution, to resolve the situation.

All but the last of these duties are outlined in Part I of Chapter One of the Constitution.

Sections 2–5 deal with the Governor-General. The last three sections of Chapter One also deal with the Crown, as they refer to:

- the need for bills which have passed the two Houses of Parliament to receive royal assent before they become law;
- the power of the Queen to disallow a law given assent by the Governor-General up to a year after that assent; and
- the rule that bills reserved for the Queen's pleasure by the Governor-General shall not have any force, '...unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by proclamation, that it has received the Queen's assent.'

It is argued that having a non-partisan head of state who can exercise these functions provides stability to our democracy.

Discussion:

What do you see as the advantages of having a monarch and/or his/her representative perform the ceremonial functions of government? As most are exercised on the advice of the Prime Minister, should they be continued by a head of state, whether a constitutional monarch or a republican president?

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• The Senate: the States' House— or 'unrepresentative swill'?

(Trick question: How many members of the Commonwealth Parliament represent each member of your learning circle? Answer: three or 13—a member of the House of Representatives and all the senators from your Territory or State which is one electorate)

Paul Keating's provocative statement of 1994 that Senators are 'unrepresentative swill' reflects the fact that the membership of the Senate does not reflect the size of the populations of the States, which each have an equal number of senators—currently 12. The ACT and Northern Territory have two senators each. However, under Section 24 of the Constitution a nexus between the number of House of Representative members and senators is established. The former must be 'as near as practicable, twice the number of senators'. An attempt to break this nexus in a constitutional referendum in 1967 was soundly defeated.

In 1901 the Constitution granted each State the right to elect six senators who would be elected for six years, with each State being a multiple-member electorate. The original figure has been increased to 12 senators for each State.

The Australian Constitution was framed as a federal compact. It was felt that the States needed equal representation in order to protect their interests from the new Commonwealth Government. In fact a formal vote was taken at the 1897 federal convention whether to call the house the Senate or The States' House. The Senate name won the majority. The States were formally involved in the process of Senate elections as state governors and governments were given formal powers in the Constitution in Sections 9, 10, 12 and 15. The last section deals with the appointment by State Governments of replacement senators—a section which became very contentious during the events of 1975, and which was changed by referendum in 1977, to ensure that this convention became law.

At the time of Federation, the States with small populations—Tasmania, Western Australia, Queensland and South Australia—were all concerned about the power of New South Wales and Victoria. If representation for the Senate was based on population, as was the House of Representatives, they believed the representatives of the more populated states would combine against them. They did not perceive that state loyalty would soon be replaced by party loyalty in the new federal system.

The three main criticisms of the Senate are that:

- the emergence of united and disciplined political parties has meant that Senators follow party discipline, not State interests;
- the swing of the balance of power from the States to the Commonwealth over many decades has made the defence of States' interests irrelevant; and
- the Senate is not democratic because electors' votes do not have equal value throughout the Commonwealth. The fact that Tasmania has as many Senators as New South Wales is seen to be undemocratic by many.

Discussion:

Does the original formula for a 'States' House', with equal number of Senators from each State still make sense?

Which Senators come from your State or Territory. Do you feel equally represented by all of them?

• Contemporary role of the Senate

Since 1981 the Senate has developed a new role. Although there have been earlier times when governments with a majority in the lower house have not enjoyed a majority in the Senate, the emergence of continuous representation for smaller parties and regular election of independents has ensured that neither major political party can expect to gain a majority in the Senate. The presence of Democrat, Nuclear Disarmament Party, Green and Independent senators has greatly influenced the legislative process in the Parliament. At the same time, partly to appease those senators holding the balance of power, the role of Senate committees, and senators' membership of joint committees has been extended.

This situation has been made possible by the change to proportional representation as the method for electing senators. Initially senators were elected using the 'first-past-the-post' system. In 1918 this was changed to straight preferential voting. For the 1949 elections the Commonwealth changed to a system involving preferential proportional voting, similar to the system which was in use for the Tasmanian House of Assembly. This system had been advocated by Catherine Helen Spence in the 1890s and many since then as the most democratic form of electoral system.

This change to the electoral system was introduced by legislation, and, of course, could be changed by legislation. The current situation has arguments for and against.

In favour it is argued that the review role of the Senate through the election of minor party members and independents is an important check and balance in the Commonwealth Parliament. Proportional representation is central to this diversity of composition and should be protected.

On the other hand, the lack of a majority in the Senate often prevents a government implementing its policies. Some argue that the present system puts too much power in the hands of minor parties and independents when they hold the balance of power in the Senate.

Discussion:

On balance, has the parliamentary process and the quality of government benefited, or suffered from the fact that the balance of power in the Senate is now regularly in the hands of minor parties and independents?



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• The Senate and money bills

Traditionally, upper houses have had a role as 'houses of review' of government legislation. This allows them to return bills coming from the lower house for re-consideration and change before they are sent again to the upper house. But not all parliamentary systems have an upper house. New Zealand abolished its upper house in 1950; Queensland abolished its Legislative Council in 1921.

In Australia, unlike most other parliamentary upper houses, the Senate also has the power to initiate legislation, except for the appropriation (spending) of government revenue or the imposition of taxation. Under Section 53 of the Constitution, the Senate 'may not amend any proposed law so as to increase any proposed charge or burden on the people.' However, although unable to amend revenue legislation, they can reject it and return it to the House of Representatives. If this bill is returned after an interval of three months to the Senate without being amended in any way and the Senate again rejects it, then the Government may advise the Governor-General to simultaneously dissolve the Senate and House of Representatives—a double dissolution. These provisions in Section 57 of the Constitution were designed to break deadlocks between the houses which had caused several serious constitutional crises in pre-federation, colonial parliaments.

Although convention said that the Senate would not reject or delay appropriation bills, that was what happened in the constitutional crisis of 1975. This occurred after another convention—that of replacing senators with senators of their own party—was technically adhered to by the Queensland Government, but only when that State Government had located an ALP member who was acceptable to the Queensland Government—not one nominated by the ALP. He was Senator Albert Field.

It was felt by many that the Senate had overstepped its constitutional role and the conventions which were implicit in the Constitution. The Liberal Party view was that the Senate was within its constitutional rights. The Chief Justice of the High Court at the time, Sir Garfield Barwick, also supported this view. One of the eight constitutional amendment referenda which has passed since 1901 was the one in 1977 that wrote into the Constitution that Senate vacancies could only be replaced with members of the party of the senator who had vacated the Senate.

In Australia, unlike most other parliamentary upper houses, the Senate also has the power to initiate legislation, except for the appropriation (spending) of government revenue or the imposition of taxation.

In fact, Section 53 of the Constitution is so complex that in 1994 the House of Representatives Standing Committee on Legal and Constitutional Affairs was asked to report solely on its contentious third paragraph. In its report of November 1995 the Committee concluded that 'The provisions of Section 53 of the Constitution were initially a political compromise brought about by the conflicting principles of the rights of the people in a democracy and the rights of the states in a federation.' It recommended that a compact be drawn up between the Houses of Parliament, using the constitutional power conferred under Section 50, by which they would agree not to

interrupt the passage of supply bills, while acknowledging that prior compacts had not always been successful.

Ironically, the power of the British House of Lords to reject supply bills was curtailed in 1910 after a similar constitutional crisis, and the issue was resolved in Britain. If Federation had been a decade later, then the Australian Constitution makers would probably have followed this development and limited or completely curtailed the power of the Senate to reject supply.

Discussion:

Has the Senate got too much power?

Should its power to reject money bills (Section 53 of the Australian Constitution) be removed or limited?

Should it have other powers cut?

Would our democracy benefit if the Senate was completely abolished?

End of Session

Allow time at the end of the session to reflect on how the group is going and what you want to do in the next session. Some things to deal with are:

- details for the next meeting;
- whether the group feels their learning circle has developed a democratic approach to its members and the subject matter;
- distribution of Session 4 notes;
- discussion about visits, visitors and other activities by the group; and
- allowing time for individuals to report on their journal entries, research and interests.

Next Session:
The Executive
Government—
Representative
Leaders or
Elected Dictators?

Background document 1

Extract from Parliament of Australia Joint Standing Committee on Electoral Matters Inquiry report—The 1996 Federal Election

Chapter Three—Preferential and Compulsory Voting

Compulsory voting was first introduced in Australia in 1915 by the government of Queensland. A person who does not vote at a Federal election is guilty of an offence and must pay a penalty of \$20.00, unless he or she can provide to the Australian Electoral Commission (AEC) a reason which must be 'valid and sufficient'. Failure to pay the penalty may lead to court proceedings and a fine of up to \$50.00 plus court costs.

To date the political parties have conspired to use the law to do what in virtually every other democracy the parties themselves must do—namely, maximise voter turnout at elections. However, if Australia is to consider itself a mature democracy compulsory voting should now be abolished. The assertion that voting is a 'right' means little if one can be imprisoned for conscientiously choosing not to exercise that right—or rather, for conscientiously exercising the right not to vote.

Also, controversy was caused during the 1996 Victorian State Election by the jailing of Mr Albert Langer. Mr Langer had defied a Victorian Supreme Court injunction preventing him from breaching Section 329A of the Electoral Act. Section 329A makes it an offence to encourage, during the election period, voters to fill in House of Representatives ballot papers other than in accordance with the full preferential voting method set out in Section 240 of the

Electoral Act.

The Langer affair has clearly shown that Section 329A is an ineffective and heavy-handed provision. Section 329A and related provisions should be repealed, while the wording of Section 240 should be clarified.

Recommendation 12:

That Section 245 of the Electoral Act and Section 45 of the Referendum Act, and related provisions providing for compulsory voting at federal elections and referenda, be repealed. In the interests of effective management of the electoral system and maintaining accurate records of turnout, compulsory enrolment should be retained.

Full document at

<http://www.aph.gov.au/house/committee/em/elec/elecdec.htm>

Background document 2

Sun-Herald Poll 1997

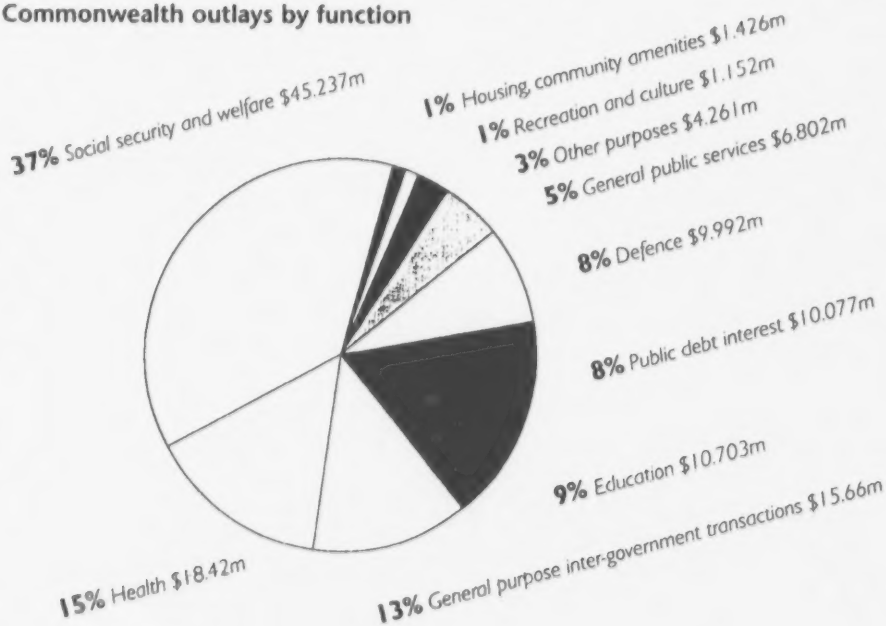
In a survey conducted for the Sun-Herald newspaper, interviewees were asked 'Do you believe the following have a good or bad influence on Australia today?' The results were as follows:

	Good %	Bad %
The ABC	85	8
Sports personalities	83	9
Aboriginal culture	75	13
The police	73	19
The church	67	17
TV personalities	66	18
Pop musicians	64	20
Newspapers	53	33
Business leaders	51	33
The judiciary	45	44
Trade unions	41	44
Banks	34	57
Politicians	21	65
Casinos	17	68

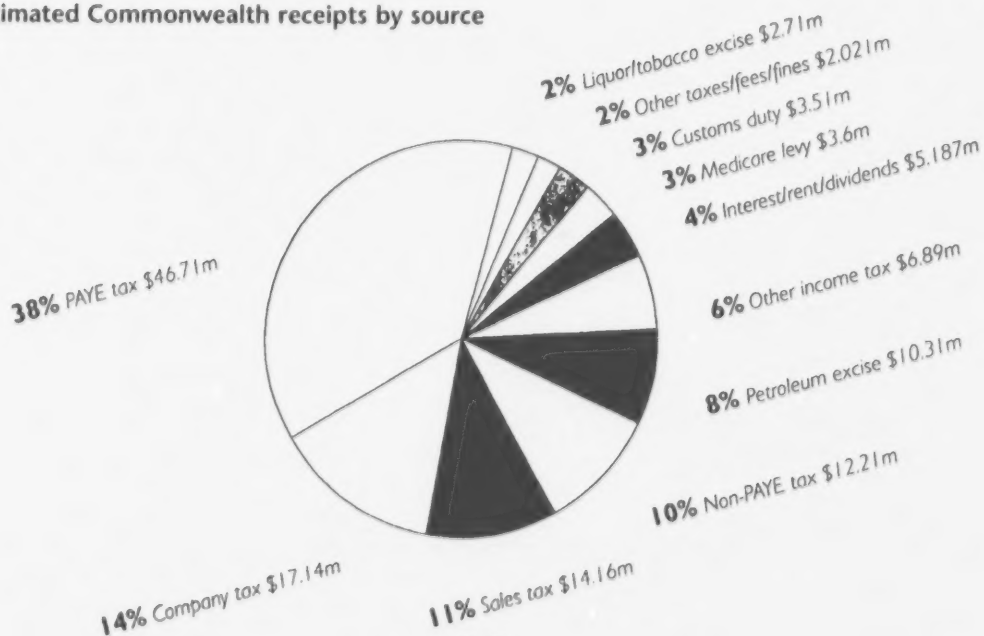
Background document 3

1995–96 Budget

Estimated Commonwealth outlays by function



Estimated Commonwealth receipts by source



88



Government

REPRESENTATIVE LEADERSHIP
OR ELECTED DICTATOR

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89

DISCOVERING
Democracy

The Governance of Australia ~ Kit 1



• Introduction

Much of the uncertainty surrounding federal executive power in Australia stems from the contradictions inherent in the simultaneous operation of the British and American principles.

George Winterton (1983) *Parliament the Executive and the Governor-General* p.1.

It is the executive which has inherited ultimate sovereignty along with responsibility, and not the 'democratic' institutions of Parliament.

R.S. Parker (1968) *The People and the Constitution*

The Executive is the branch of Government charged with the day-to-day running of the affairs of the nation. It is made up of the Governor-General, Prime Minister and other Ministers of State, and the public servants of government departments. Their roles are distinct:

- Today, the Governor-General plays a largely symbolic role, because he is bound by the conventions of the Westminster system to act in most instances on the advice of the Prime Minister. All Commonwealth legislation and regulations are signed into law by the Governor-General, who still meets with ministers in Executive Council meetings. These are not policy making meetings but legal requirements of the Australian Constitution. The Governor-General also performs ceremonial duties like the receipt of diplomatic credentials and presiding over the opening of Parliament. He also represents the Crown at public occasions and in his speeches may or may not choose to make a comment on contemporary issues.

- The Prime Minister and Ministers of State (some or all of whom are included in the Cabinet) is that part of the Executive which decides the policies of the government and are often referred to as the Executive Government.
- The public service departments which are controlled by their ministers implement the policies decided by the Executive Government. Those policies may arise from, or at least be influenced by, the departments themselves. They administer tax collection and revenue expenditure of the government. This is such a large group that some suggest it should be recognised as a separate branch of government—the 'administrative branch' of government.

Most of the real power in government lies with the Prime Minister and Cabinet, and many would argue that it is too great.

Most of the real power in government lies with the Prime Minister and Cabinet, and many would argue that it is too great. They point to the excesses of Executive power in Queensland under Premier Sir Joh Bjelke-Petersen, in New Zealand under Robert Muldoon (both systems of government which had abolished their upper houses), in Western Australia during the 'WA Inc.' period and at a various times at the Commonwealth level.

Suggested activities

Westminster or Washminster?	3
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Resources

- Australian Constitution Chapter II

• Westminster or Washminster?

The terms "responsible government" and "Westminster system" are used interchangeably to describe one of the basic principles enshrined in the Australian system of government. The term "Westminster", of course, acknowledges Australia's British constitutional heritage. The model is the House of Commons which meets in London at Westminster. It is the pure model of responsible government.

However, it is always acknowledged also that the Australian system is more complicated, primarily because Australia is a federal system. The federal system stresses division of powers while the Westminster system stresses consolidation of powers. In Australia the upper house, the Senate, represents the federal principle built into the parliament.

Some would say that it is insufficient to portray the Australian system as a complicated variant of the Westminster system. Rather, it is argued, the role of the Senate in the constitutional crisis of 1975 and the importance of the fact that the Senate is now invariably controlled by the Opposition parties means that the Australian system is quite different.

This view has come to call the Australian system the Washminster system, building in the notion that Australia, because of federalism, owes as much to Washington, the American capital city, as to Westminster. American federalism, in which the upper house is known as the Senate, was the main model for the Australian constitution. The term Washminster was first coined by Dr. Elaine Thompson in 1980.

Furthermore, there is more than just the Senate to Washminster. Its advocates stress also that responsible government has been diminished by

the control of parliaments by political parties to the extent that parliaments no longer are able to hold executive government responsible as in the classical theory.

In addition, executive government is restricted by the constitutional division of powers between the federal and state governments. And it is confined by the separation of powers between the executive and the judiciary, especially the High Court.

Given all these differences between the British and Australian systems would it not be more appropriate to label the Australian way of doing things the Washminster system?

• The Crown and Executive Government

Historically, in the British system of government, the monarch was the Executive Government. Over many centuries (some would say since the Magna Carta) the powers of the monarch were challenged and limited by Parliament. One monarch, Charles I, was even executed on the authority of Parliament! This process transferred many of the traditional powers of the monarch to the elected Prime Minister and the Cabinet comprising other elected ministers. These roles and relationships are complex, particularly as 'the Crown' exists constitutionally as a disembodied concept rather than as a person. Hence the old saying 'The King is dead, long live the King!'

At the time of Federation in Australia this left the sovereign (and her representative) with two groups of powers—those exercised on the advice of the government ministers, and those 'reserve powers' which could be exercised without such advice. The second group relies upon the common law of constitutional conventions which are not written into the Constitution, and are a source of disagreement and confusion. Experts even disagree on whether it is possible, or desirable, to 'codify' these reserve powers.

Chapter Two of the Australian Constitution, which outlines the rules for the executive government, comprises only ten sections. This chapter is very brief given that this, the largest, branch of government, is also the most powerful, the most difficult to control and least open to scrutiny. It is the least clear chapter of the Australian Constitution, and relies heavily on British tradition and convention. Its first section sets the tone:

Section 61. The Executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Those 39 words incorporate great constitutional principles and are the distillation of centuries of constitutional history. Citizens and High Court justices can take comfort from the wording, for Section 61, they would say, recognises that Parliament, as the law making body of the Commonwealth, is supreme, and that the sovereign is controlled by the Rule of Law. Traditionalists can argue that the section is symbolic yet important because it continues the mystery (even secrecy) and conventions of the monarchy, which are important for the stability of the political system, for the Crown embodies the government as a whole.

Traditionalists can argue that [Section 61] is symbolic yet important because it continues the mystery (even secrecy) and conventions of the monarchy, which are important for the stability of the political system....

This unity and pervasiveness of the Crown can still be found reflected throughout Australian society: oaths for parliamentarians, defence force members and public servants are sworn to the Crown rather than to the people of Australia, government legal cases are prosecuted by the Crown, government enquiries are called Royal Commissions, rather than Government Commissions, prisoners are euphemistically referred to as His/Her Majesty's guests, the use of 'Royal' in the names of many institutions and organisations—such as the Easter Show—and in the designation 'Crown Land'.

Optional extra activity:

The issue of 'codification' of the reserve powers of the Governor-General was much discussed in the course of the 1998 Constitutional Convention. One of the group might like to investigate this issue further, and report back to the group later on why codification might be difficult, and why some people oppose the very idea.

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• What is Executive power?

Executive power is the power to execute the business of government on the basis of prerogative powers, or after policies have been enacted into law by the parliament.

Executive power comes from three sources:

- Some executive power is given directly by the Constitution. The power to dissolve both Houses of Parliament, and to convene a joint sitting, are examples.
- A lot of executive power is created by legislation passed through the Parliament. Commonwealth Acts create executive power as they authorise the Governor-General or a minister and his public servants power to do certain things.

Parliamentary Acts often leave their detailed execution to regulations to be decided by the Executive and there have been many cases where elected governments have been condemned for conducting 'government by regulation' which avoids parliamentary scrutiny. These powers extend into our everyday lives and involve collection of income and other taxes, family law, rates of pay, declarations of states of emergency, electoral law and many others. For example, in 1995 the Acts of Parliament covered 5626 pages and the Statutory Rules covered 3893 pages.

- The common law, or convention, recognises that the Executive government has some other important kinds of executive power. These are derived from the 'prerogative' powers of the Crown. Some of these are familiar, because they are things that any adult, or 'legal person' can do: make contracts, spend money, or set up a company, for example. At the other extreme, others are things that only a 'sovereign' or a government may do. Controlling foreign policy by making treaties or agreements with other countries is one example. Declaring war and

making peace are other examples. The prerogative also comprises important rights and immunities traditionally enjoyed by the monarch and which now apply to the organs of government that act on behalf of 'the Crown'.

As the Australian Constitution presently stands, all of these powers can be exercised without any authority from Parliament. The term 'prerogative' powers is sometimes used to refer to all Executive power that can be exercised without parliamentary authority. Sometimes it is used to refer to the 'sovereign' type of Executive powers alone. These powers are exercised by the Governor-General and the Prime Minister, often on the advice of the latter to the former.

Executive power is the power to execute the business of government on the basis of prerogative powers, or after policies have been enacted into law by the parliament.

In 1976, Lord Hailsham, in the BBC's Dimblebey Lecture, described the Executive government as 'an elective dictatorship'. His description could apply to any British Commonwealth country which has incorporated the Westminster system into its Constitution. What did he mean? The Executive Government is drawn from the majority of the lower house. The preferential voting system favours large political parties. When party discipline is strong, the Executive effectively controls the lower house so its support can be taken for granted.

Backbenchers—government members outside the ministry—are ‘the pawns in the game’; they give the Executive Government the numbers it needs to do whatever it wants—at least in the lower house. A landslide electoral victory can therefore create problems. If there are too many backbenchers without any meaningful role in the government process, they are likely to become restless. Conversely, party discipline can be easier when the government’s majority is a narrow one.

The proportional voting system used for the Australian Senate, and for the single chamber of the New Zealand Parliament since 1996, has meant a wider cross-section of political parties are represented and, as in the ACT Legislative Assembly, minority governments have become quite normal. Having to include members from other parties in the ministry, or at least have the support of other parties or independents serves to limit the power of the executive of a minority government.

Discussion:

Although the Executive formally comprises the Governor-General and elected representatives who advise him, it can be seen as a less than democratic part of our governance. Do you think this criticism is fair? Can Executive Government be made more open?

Optional activity:

Clubs and societies elect their executive at annual general meetings. How accountable do you think these office holders should be to the membership of the association? Should they be able to get on with ‘running the show’ or should they not act without the approval of a general meeting? Are the experiences of a headstrong president of an association you may have known useful in understanding the role of political leaders?

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• Responsible government

Section 64 lays the foundation for responsible government in the Commonwealth. It does not mention either the Prime Minister or Cabinet, although these are now the most powerful elements in the Government.

The theory and practice of responsible government which had developed by the 19th century was regarded as the high point of constitutional evolution—the 'Westminster system'.

The central tenet of this classical view of responsible government is that ministers are responsible for decisions of government, which are taken in the name of the Crown. Secondly, it means that ministers share a collective responsibility for the conduct of the government through the principle of cabinet solidarity. Finally, it means that ministers are responsible for their actions and the actions of their departments to the lower house of Parliament, which may examine their performance in parliamentary debate (especially Question Time) and under certain parliamentary privileges. In turn, the members of Parliament are elected by voters to whom they are responsible. Such responsibilities are supposed to ensure that power is not abused or exceeded.

The application of these basic principles of responsible government is more complicated in 'bi-cameral' (two Houses) systems of government such as ours. Sir Richard Barker, representing South Australia at the 1897 Convention in Sydney, argued that: 'The essence of federation is the existence of two houses, if not of actually co-equal power, at all events of approximately co-equal power. The essence of responsible government is the existence of one chamber of predominant power. Now how are we to reconcile two irreconcilable propositions?'

The historical model for our Parliament was the British system—with a large House of Commons and an hereditary, non-democratic, appointed upper house—not elected at all! Yet the Australian Constitution determined there should be an elected Senate of 36 Senators which would have more powers than the British House of Lords, and from which Ministers could also be drawn. Many commentators believe the seeds of the 1975 constitutional crisis were sown in 1901 in these sections of the Australian Constitution.

Although the Senate was created with virtually equal powers to the House of Representatives, convention has dictated that the Prime Minister should not be a member of that chamber, although nothing in the Constitution prevents this. When John Gorton was elected Federal Liberal Party leader in 1968 (after the disappearance of the Prime Minister, Harold Holt) he resigned from the Senate after becoming Prime Minister, to contest Holt's lower house seat of Higgins in order to observe this convention. At State level only one Premier has been an Upper House member in this century—Hal Colebatch (WA, National Coalition, 1919).

Discussion:

Responsible government requires that the Executive is accountable to Parliament which comprises elected members. Most members of your group are likely to be voters. (Examine Background document 2 'Accountability to Parliament' p 15.)

How accountable is the Executive Government (Prime Minister and Cabinet) to the Members of Parliament who represent you? Do you feel you can influence government decisions through your representatives? Does it matter?

• The Prime Minister

The potential power of the Prime Minister is immense. His power flows from a number of different functions which he exercises. He is at the one time responsible for advising the Governor-General and the Crown, he is the chief minister, he is chairman of the Cabinet and he is the leader of the political party in government'.

David Solomon, *Australia's Government and Parliament*, 6th ed. 1984, p.45.

As adviser to the Crown he/she:

- nominates the person to be appointed as Governor-General and may recommend his/her removal.

As adviser to the Governor-General he/she:

- advises the Governor-General to effect a dissolution (although there have been occasions when this advice has not been taken!); and
- can recommend the exercise of the prerogative of pardon.

As chief minister he/she:

- chooses his/her ministers, or in the case of the Australian Labor Party, their portfolios;
- can remove ministers;
- is supported by his/her department (the Department of Prime Minister and Cabinet); and
- appoints or recommends appointment of ambassadors, members of the public service, and statutory authorities.

As chairman of cabinet he/she:

- decides the business of cabinet and its order;
- can refer matters to cabinet committees, full cabinet or leave them in the hands of individual ministers.

As party leader he/she:

- speaks on behalf of his/her party in Parliament and the community; and
- takes responsibility for party policies and election strategies.

The public image and role of Australian Prime Ministers has further expanded in recent times as a more American presidential style of politics has emerged in Australia. Daily media exposure, television debates (with a panel of judges to decide a winner) during election campaigns between the Prime Minister and Leader of Opposition and increasing election expenditure are some features of these developments. They all give the Prime Minister a higher profile. The resulting expectation is that the Prime Minister should be involved all areas of government and play a key role in solving disputes. His/her leadership must be public and constant.

Discussion:

Prime Ministers attract more attention from the media than any other politician. Do you think this attention is warranted?

Australia has had 25 Prime Ministers. Who has been most effective in this role? Who has been most democratic? What qualities do we expect in our prime ministers?

See Background document 1 (p 14) for a list of Prime Ministers of Australia.

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• The role and powers of the Cabinet

The role of the Cabinet in Australian government is also determined by convention, rather than the Constitution. Cabinet may comprise all, or only some ministers of state. In the latter case it is referred to as the 'inner ministry' and the non-Cabinet ministers comprise the 'outer ministry'.

Its operation follows certain conventions:

- meetings are secret and records of those meetings are not available for 30 years. (Copies of pre-1969 Cabinet papers are available from the National Archives of Australia. Their URL is <http://www.naa.gov.au>);
- Cabinet decisions are binding on all members (collective responsibility) even though they may personally oppose the measure before a decision is made;
- the Prime Minister is the chairman and spokesman of Cabinet;
- Cabinet exclusively comprises Ministers of State who are chosen by the Prime Minister, or in the case of the Australian Labor Party, the Prime Minister allocates ministries to those chosen by the parliamentary caucus as the ministers; and
- the media are excluded from Cabinet meetings.

Discussion:

Do the Prime Minister and Cabinet have too much power in Australian governance?

• The Role of the Public Service

The Westminster system encompasses the concept of a non-political, career public service which can offer specialist advice based on long-term experience and proven merit to any government. However many people see bureaucrats as self-serving, unadventurous in their advice to governments and socially conservative people who rejoice in their anonymous exercise of power even if it is over routine administrative matters. The popular BBC television series 'Yes Minister' tapped into this perspective. Conversations between the fictional Minister Jim Hacker and his fictional permanent head, Sir Humphrey Appleby, have been viewed as insightful commentaries on government.

When Jim Hacker, the new Minister, meets his Departmental Secretary, Sir Humphrey Appleby, he is introduced by his Principal Private Secretary, Bernard Woolley.

'I believe you've met before,' Bernard remarked...

Sir Humphrey said, 'Yes, we did cross swords when the Minister gave me a grilling over the Estimates in the Public Accounts Committee last year. He asked me all the questions I hoped nobody would ask.'

This is splendid. Sir Humphrey clearly admires me. I tried to brush it off. 'Well,' I said, 'Opposition's about asking awkward questions.'

'Yes,' said Sir Humphrey, 'and government is about not answering them.'

I was surprised. 'But you answered all my questions, didn't you?' I commented.

'I'm glad you thought so, Minister,' said Sir Humphrey.

Yes Minister. The Diaries of a Cabinet Minister, by the Rt Hon James Hacker MP

One public servant who spoke up was Charles Perkins. In January 1974, when an officer of the Department of Aboriginal Affairs, he publicly criticised government policy towards Aborigines, including statements made by his own minister. He was reprimanded by Mr Dexter, the permanent head, but the Minister, Senator James Cavanagh of South Australia pressed for additional disciplinary action. He was charged with improper conduct under the Public Service Act. The Prime Minister, Mr Whitlam, exercising his executive powers, intervened to say that the charges should not have been laid, and, if they were upheld, he would not recommend to the Governor-General that the penalties be implemented. The charges were dropped.

(See also C Perkins, *A Bastard Like Me*)

Dr Peter Wilenski, when Chairman of the Public Service Board, (now the Public Service and Merit Protection Commission) explained the role of the public service in the Westminster system of parliamentary government as follows:

The conventional picture of how the public service fits into the system of liberal parliamentary democracy is a fairly straightforward one. The people elect a Parliament, the majority in the Parliament choose a ministry, the ministers consider advice that they receive from the permanent public service and elsewhere, and make decisions which are government decisions.

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The public service, apolitical and appointed on merit, then carries out those decisions. The line of responsibility is clear. The public servant is responsible to the minister, the minister is responsible to the Parliament, Parliament is responsible to the people. The public servant has no independent power. He or she is responsible to the minister and the minister is, through Parliament, responsible to the people.

The anonymity and neutrality of the public service has been reinforced by a code of official secrecy outlined in the Crimes Act and Public Service Act which offered strong penalties for offenders. Under their provisions, public servants were completely prohibited from making public comment until 1974, however these restrictions have since been relaxed.

In the past decade or so there have been some fundamental changes to public sector management, and hence to the public service. Government employment is no longer the principal form of employment in Australia. The general trends are for the public sector to become smaller—through various measures like 'down-sizing', 'out-sourcing', the use of consultants and privatisation. Also more business-like approaches have been adopted by the public sector using such measures as greater competition, competitive tendering, increased cost recovery, and fixed term contracts with performance bonuses for senior managers.

Some argue that these measures will destroy the capacity of the public service for giving 'fearless and independent advice', and undermine the important role of the public sector in supporting access and equity—making sure that all are treated fairly, according to real needs.

Others feel equally strongly that cutting back the size of government, and exposing public sector organisations to a constant drive for greater efficiency and effectiveness is long overdue.

Discussion:

Are any members of the group, or their family members, public servants? What have been your experiences of change in the roles of the public service over the past few years? Have Australians on the whole benefited from cuts to the size of the public sector and government programs administered by government employees? Do you think the use of consultants who are not public servants is a democratic practice?



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• A case study of executive power

The control of the police and military forces is possibly the greatest power of the Executive Government, although the finances to equip and pay these forces must be appropriated by Parliament, it is usually under the control of the Executive!

The Australian Constitution outlines the situations for the use of and the formal control of the military in separate sections. Section 119 says 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'. The only other reference to military affairs in the Constitution is the declaration in Section 68 which says 'The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative'. This can lead to some interesting situations, even in peacetime.

Executive power and the Hilton Hotel bombing

(This summary of events following the Hilton Hotel bombing is taken from: Jenny Hocking (1993) *Beyond Terrorism*, Allen and Unwin, St Leonards)

In the early hours of 13 February 1978 a bomb exploded outside the Hilton Hotel in Sydney. Placed in a rubbish bin, the bomb killed two council workers and a policeman later died from injuries. Several others were injured. The Commonwealth Heads of Government Regional Meeting was due to begin in Sydney later that day

and 11 visiting heads of government were staying in the Hilton at the time of the explosion.

Within seven hours of the explosion the Australian Prime Minister, Malcolm Fraser, had made the unprecedented decision to call out members of the Defence Force to protect the visiting Commonwealth leaders 'by reason of terrorist activities in the State of New South Wales' (*Commonwealth of Australia Gazette*). For the first time since Federation, military forces were deployed in Australia as soldiers in peace time. Troops had been used to break the Melbourne police strike of 1923, and in 1949 to break the coal strike, but on these occasions they were used as law enforcement officers and coalminers respectively.

After preliminary meetings which commenced at 12.50pm, a Cabinet meeting was held at 2.30pm at the Hilton Hotel. At 11pm an Executive Council meeting was held at Admiralty House in Sydney where the Governor-General, acting on the Cabinet decision, signed a Minute which authorised the deployment of an unspecified number of troops for an unspecified period.

It was intended that the Heads of Government travel to Bowral by train to spend two days at a luxury retreat, Berida Manor. Although this plan was changed, 800 troops were placed to guard the entire length of the railway line. Another 1200 troops from Holsworthy army base—elements of the 2nd Cavalry Regiment, 12/15 Medium Artillery Regiments and the 5/7 Royal Australian Regiment began their operation at 7.47am on the 14 February. The 6000 residents of Bowral woke up to find 800 fully armed combat troops guarding the town. The leaders arrived in Bowral by helicopter

and by road and the Hume Highway was guarded by armoured personnel carriers and armed troops at every bridge and railway crossing. And then, at about 11pm on that Tuesday night, although the Commonwealth leaders were to stay there another day, the troops were withdrawn from Bowral.

So ended the operation, but it raised many questions:

- should the government have justified its use of the troops under the Constitution?
- should the government have used the legislative powers of Section 119?
- were the civilians of Bowral under military (martial) law?
- are members of the Executive above the law in 'emergencies'—especially terrorism?

The parliamentary debate on the operation took place on 23 February 1978. There was general agreement that the troops were called out under Section 61 of the Constitution. Other commentators argued that because foreign heads of state were present the Commonwealth could have invoked its external affairs power.

Here is one commentary:

The Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land. If necessary, constitutional and other writs are available to restrain apprehended violations and to remedy past violations. I restate these elementary principles because astonishingly one of the plaintiffs asserted through counsel that it followed from the nature of Executive power, even in a situation other than war, to order one of its citizens to kill another person. Such a proposition is inconsistent with the rule of law. It is subversive of the Constitution and the laws. It is, in other countries, the justification for death squads.

Discussion:

Do you think the executive should have special non-democratic powers in emergencies?

End of Session

Allow some time near the end of the session to reflect on how the group is going and what you want to do in the next session and how you will prepare for it. Some things to deal with are:

- details for the next meeting;
- distribution of Session 5 notes;
- consider individual follow-up activities between the sessions;
- discussion about visits, visitors and other extra resources; and
- allowing some time for individuals to report on their research and journal entries if these have not been dealt with during the session.

Next session: The High Court of Australia

Background document 1

Prime Ministers of Australia since 1901

Name	Party	Period in Office		Length of Term
Barton, Edmund	Prot	1/1/01	to 24/9/03	2 y, 8 m, 24 days
Deakin, Alfred	Prot	24/9/03	to 27/4/04	7 m, 4 days
Watson, John Christian	ALP	27/4/04	to 17/8/04	3 m, 21 days
Reid, George	FT	18/8/04	to 05/7/05	10 m, 18 days
Deakin, Alfred	Prot	5/7/05	to 13/11/08	3 y, 4 m, 9 days
Fisher, Andrew	ALP	13/11/08	to 2/6/09	6 m, 21 days
Deakin, Alfred	Lib	2/6/09	to 29/4/10	10 m, 28 days
Fisher, Andrew	ALP	29/4/10	to 24/6/13	3 y, 1 m, 26 days
Cook, Joseph	Lib	24/6/13	to 17/9/14	1 y, 2 m, 25 days
Fisher, Andrew	ALP	17/9/14	to 27/10/15	1 y, 1 m, 11 days
Hughes, William Morris	ALP/NL/NAT	27/10/15	to 9/2/23	7 y, 3 m, 14 days
Bruce, Stanley Melbourne	NAT	9/2/23	to 22/10/29	6 y, 8 m, 14 days
Scullin, James	ALP	22/10/29	to 6/1/32	2 y, 2 m, 16 days
Lyons, Joseph	UAP	6/1/32	to 7/4/39	7 y, 3 m, 2 days
Page, Earle	CP	7/4/39	to 26/4/39	20 days
Menzies, Robert	UAP	26/4/39	to 29/8/41	2 y, 4 m, 4 day
Fadden, Arthur	CP	29/8/41	to 7/10/41	1 m, 9 days
Curtin, John	ALP	7/10/41	to 5/7/45	3 y, 8 m, 29 days
Forde, Francis	ALP	6/7/45	to 13/7/45	8 days
Chifley, Joseph Benedict	ALP	13/7/45	to 19/12/49	4 y, 5 m, 7 days
Menzies, Robert	LP	19/12/49	to 26/1/66	16 y, 1 m, 8 days
Holt, Harold	LP	26/1/66	to 19/12/67	1 y, 10 m, 23 days
McEwen, John	CP	19/12/67	to 10/1/68	23 days
Gorton, John Grey	LP	10/1/68	to 10/3/71	3 y, 2 m
McMahon, William	LP	10/3/71	to 5/12/72	1 y, 8 m, 25 days
Whitlam, Edward Gough	ALP	5/12/72	to 11/11/75	2 y, 11 m, 7 days
Fraser, John Malcolm	LP	11/11/75	to 11/3/83	7 y, 4 m
Hawke, Robert	ALP	11/3/83	to 20/12/91	8 y, 9 m, 9 days
Keating, Paul	ALP	20/12/91	to 11/3/96	4 y, 2 m, 20 days
Howard, John	LP	11/03/96	to current	

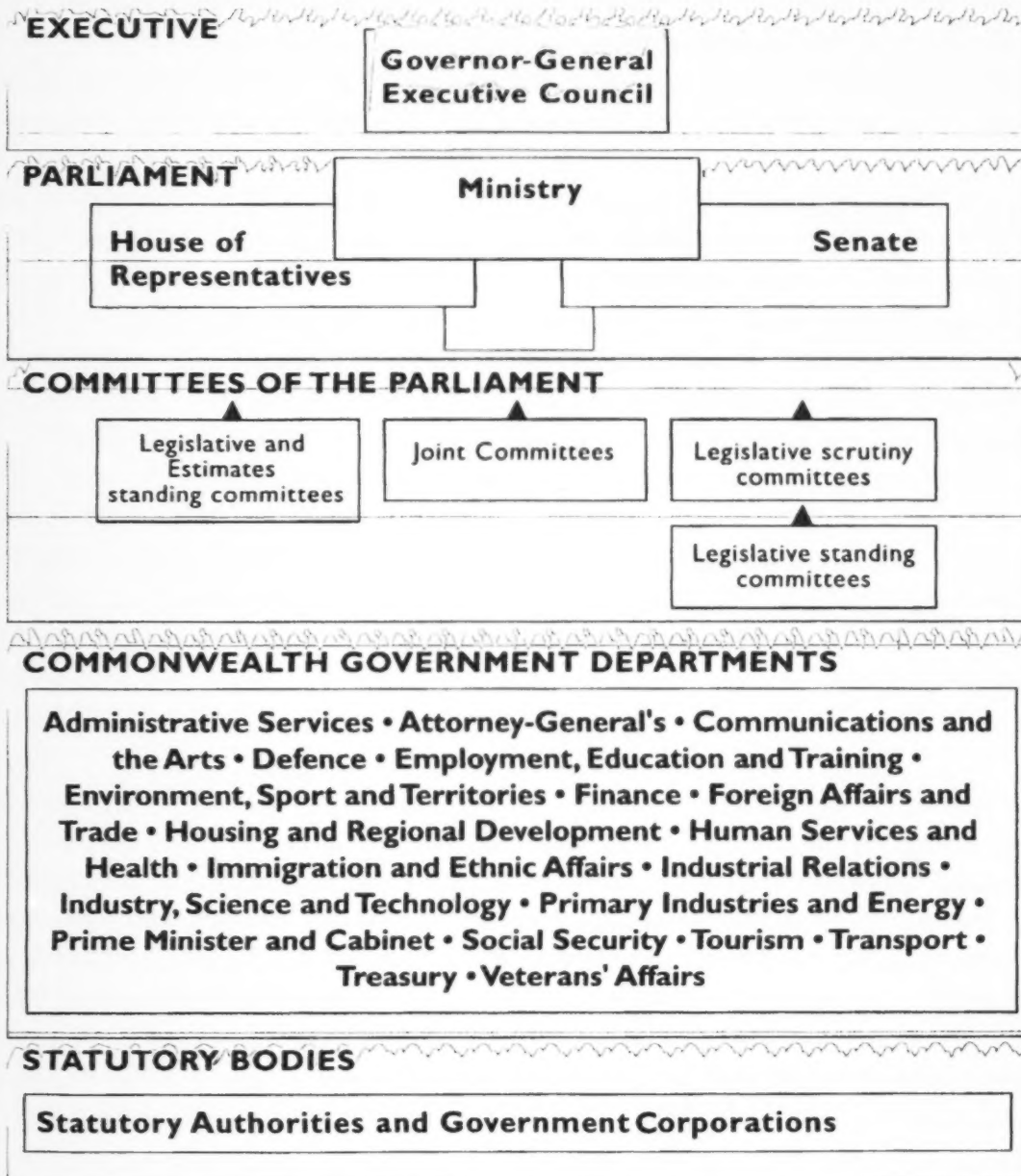
Key:

Prot—Protectionist Party
 ALP—Australian Labor Party
 Lib—Liberal Party (pre-1945)
 UAP—United Australia Party

Nat—Nationalist Party
 LP—Liberal Party (formed 1946)
 CP—Country Party
 NL—National Labor

Background document 2

Executive accountability to Parliament

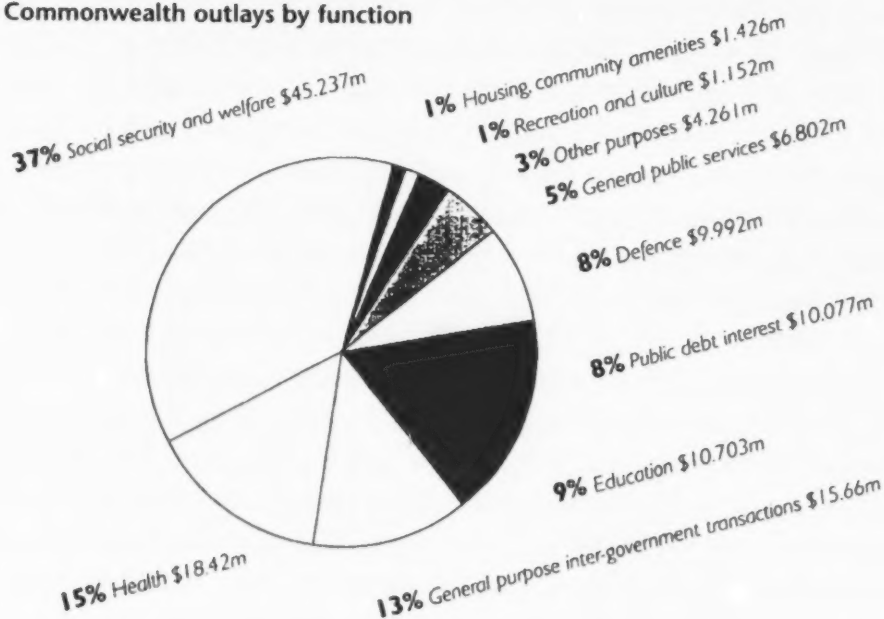


From Carter, John (1995) *Parliamentary Government in Australia*, p.6.

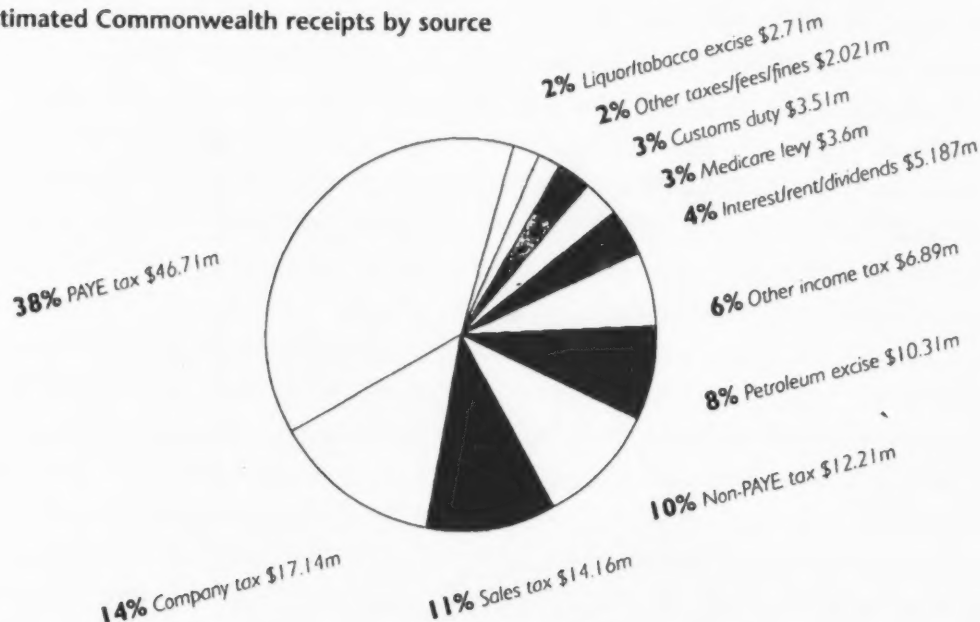
Background document 3

1995-96 Budget

Estimated Commonwealth outlays by function



Estimated Commonwealth receipts by source





Session

5

A large, stylized map of Australia, rendered in a high-contrast, black-and-white line-art style. The map shows the outline of the continent and its major islands, with internal lines suggesting state or territory boundaries. It serves as the background for the title text.

THE
High Court
OF AUSTRALIA

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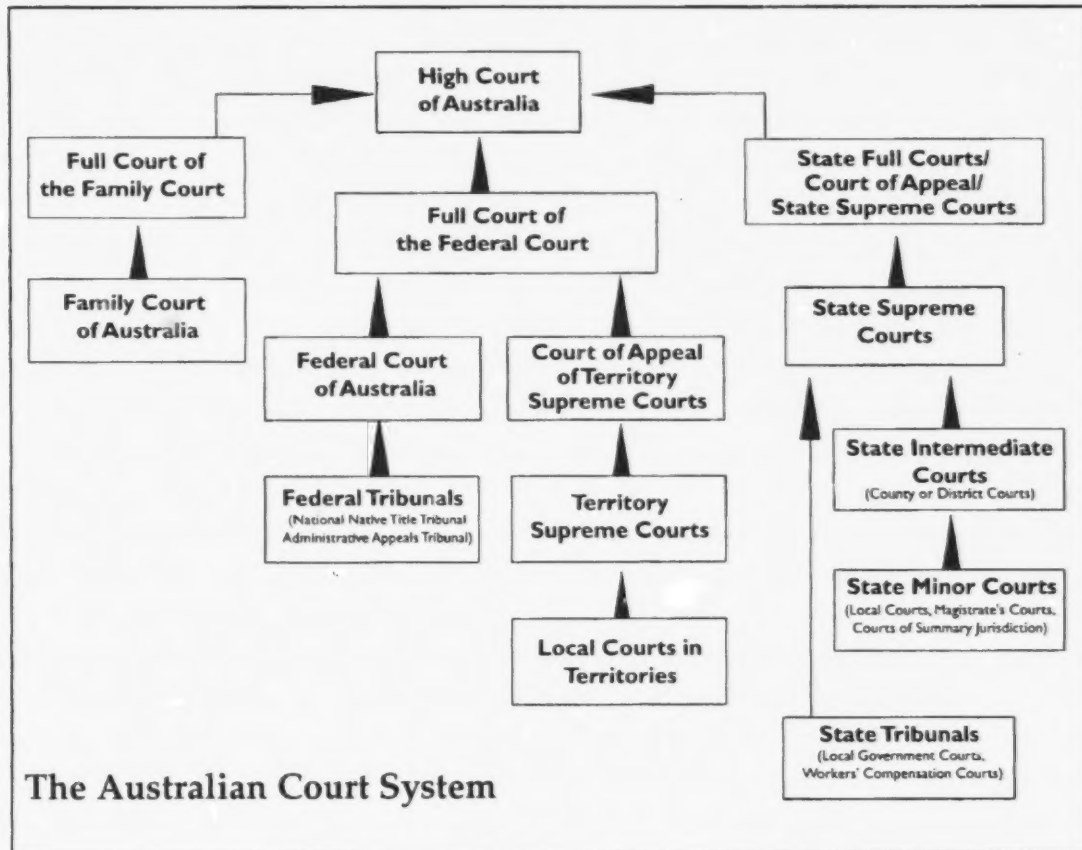
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DISCOVERING
Democracy

The Governance of Australia ~ Kit 1



• Introduction



The Australian High Court is the most important court in Australia. Its roles include constitutional interpretation, judicial review of Commonwealth legislation, the settling of disputes between the Commonwealth and States and acting as the highest court of appeal in Australia.

The High Court comprises seven appointed justices who can remain in office until they are 70 years old, unless they choose to retire earlier.

The Constitution demands that their salaries not be reduced during their term of office (although they may be increased). This is a means to ensure that their independence is not compromised.

Since its establishment in 1903 it has made thousands of judgements about a wide range of constitutional matters. Some of its cases have become famous as have some of its justices.

Its power is significant, and on its establishment it was regarded by Alfred Deakin as 'the keystone to the federal arch'. It was to be the umpire in constitutional and federal disputes by providing a resolution based on law. As these decisions have been peacefully accepted, it has provided much of the stability of Australian democracy through the rule of law.

It is an area of government which has attracted increased media attention and public interest in recent years, especially because of its decisions about native title and human rights and questions about the independence of the judiciary. These issues should form the basis of some lively discussion for learning circles.

The aims of the session are to:

- identify where the High Court fits into the Australian Constitution;
- examine your perceptions of the High Court;
- discuss some High Court judgements;
- consider the process of appointment of High Court justices; and
- examine the idea of the separation of powers in our government system and whether the High Court fulfils its role in this arrangement.

Suggested activities

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Resources

- *High Court of Australia*—brochure
- *Australian Constitution* Chapter 3

• Perceptions of the High Court

In 1997 the popular and light-hearted Australian film *'The Castle'* was partly set in the High Court, when its Aussie battler hero, Darryl Kerrigan, sought to defend his right under Section 51 (xxxi) of the Australian Constitution for just terms for the acquisition of his property adjacent to an airfield. After failing in a local Magistrate's Court, he wins his case on appeal to the High Court. However, not all treatment of the High Court is so good-humoured.

Partly because of its move to its prominent new building on the shores of Lake Burley Griffin in Canberra in 1980, and partly because of its decisions about Native Title in both the *Mabo* and *Wik* judgements, the High Court currently attracts a lot of attention from politicians and the public. There has been controversy over the appointment of particular justices to the High Court, and attacks on what some see as a tendency to encroach on the policy making role of government—'judicial activism'. Here are two samples from recent debate.

Criticising the High Court

In the 1997 Alfred Deakin Lecture, Professor Greg Craven criticised what he sees as the 'progressivism' and 'judicial activism' of the High Court:

Another relatively obvious prediction is that Australian constitutional federalism is in something very close to a terminal decline at the hands of the High Court.

He cites the 1997 judgement on Section 90 of the Australian Constitution which determined that the States had no constitutional right to collect excise duties (although the Commonwealth has promised to collect and return these revenues to the States).

He continued:

One highly likely and deeply troubling outcome of the High Court's progressivism is that of an eventual, massive confrontation with government. There is little doubt that if the Court continues sufficiently far along a politically intrusive path of rights jurisprudence, there eventually will become a point when the Executive—doubtless enthusiastically supported by the Court's beloved Parliament—will no longer be able to tolerate its pretensions.

He concludes the lecture by saying that:

...the Court itself undoubtedly is in the midst of an appalling decline in its own intellectual ethics. It is a matter of fundamental regret that the High Court of Australia, as an essentially political creature, believes not in the rule of law, but in the rule of a small number of lawyers.

Professor Greg Craven 1997

Professor Craven may have been responding to an address given on the 15 August 1997 by (High Court) Justice Michael Kirby AC CMG at the Queensland University of Technology's Faculty of Law dinner on the subject of 'Teaching Australians Civics'.

Defending the High Court

One of the chief failures of a century of federal government in Australia has been the omission to teach succeeding generations about the Constitution and how this country is governed. The result is a shocking level of ignorance about civics. This ignorance reveals itself in what passes for constitutional 'debate' in this country. It extends even to some of our leaders. In a sense, this ignorance undermines our country's commitment to constitutionalism and the rule of

law. We should be moving urgently to correct it. That should be a major objective of the celebrations of the centenary of the Constitution in 2001.

The ignorance of which I speak is not confined to one side of politics. It has infected some federal and state legislators and political leaders. It reaches truly shocking levels of misunderstanding. It is getting worse. It seems to be cumulative in its effect.

Take the comments of two State Premiers from the one side of politics. One called a judgement of the High Court 'ranting and raving'. Another described the majority judges in a recent case as 'loopy'. One suggested that the High Court was making the country 'ungovernable' because he did not like a decision which his State had fully argued and which had gone against its submissions.

It has become commonplace to stereotype the judges as 'Capital C conservatives' or 'Capital A activists' as if judges or their decisions fitted neatly into the political categories that politicians know. Another leader suggested that the High Court was wrongfully delaying an important judgement. Conduct of this kind on the sporting field in Australia could result in a spell in the sin bin. But, political comment on judges, amounting to personal denigration and reflection on their motives, has increasingly become the norm. One offender eggs the other on to more and more extravagance.

On the other side of politics a former Federal Minister this week cast what he was pleased to call 'a plague on the high and mighty'. He had previously described the majority in an important High Court decision as 'basket weavers'. But now he was at it again. The judges lacked 'common sense'. He would rather have politicians 'decide policy than High Court judges'. At least, he said, politicians 'know they need a majority of Australians to vote for them if they want to be re-elected. High Court judges have no need for majority support to keep their jobs until their dotage—and it shows!

This commentator clearly implies that the decisions of the High Court on the meaning of the Australian Constitution should be decided by popular appeal, not by legal authority. It should be determined by political choice not by the rule of law. It should bend to 'common sense' and throw away legal analysis.

There are a few elementary points to be made about all of these comments. The judges do not choose their cases. They cannot put problems off as politicians sometimes do. They have a complaint by a litigant that a particular law is unconstitutional. They have to decide that challenge. They must do so by reference to an unchanging constitutional text, conceived in the 1870s and written in the 1890s. They must yield their personal opinions to that text and the earlier decisions upon it. They are not just able to turn the problem over to the politicians or popular opinion. One would have thought that a long serving Minister of the Crown would have understood this. Alas, not so. Some politicians and many others turn not a few of the difficult problems of this country over to the High Court. Its judges must continue to do their duty, as they have for nearly a century. But it seems they must now do so in a political culture of increasing personal denigration and name-calling. It ought to stop.

You can search the newspapers in 1948 after the High Court rejected the Chifley Government's bank nationalisation and you will not find a single word questioning the integrity of the High Court judges. Likewise, after the Court overruled the Menzies' Government's Communist Party Dissolution Act in 1951. The same in 1956 when the Court struck down the then Arbitration Court system. Similarly, after the Tasmania Dam case in 1983. Most of these were majority decisions. But the governments of the day recognised that the nation needed a constitutional umpire. In the Australian nation, that umpire is the High Court. But now some players want to attack the umpire personally.

It is a development that reflects an increasingly graceless time. It deserves careful re-consideration.

No judge's decisions are beyond criticism. In a democracy, criticism is healthy. Most judges of my acquaintance welcome and reflect upon public criticism of their reasoning. The High Court's decisions themselves uphold a high measure of free speech in this country. But epithets like 'ranting and raving' and 'basket weavers' deserve nothing but contempt from the people. The message should go out clearly. Criticise decisions. Object to reasoning. Propound alternatives. Suggest lessons from other places. But leave off the personal attacks and common name-calling. Otherwise this conduct becomes cumulative. It debases our polity. It encourages others to join in the verbal and personal abuse. The price will be paid by a loss of community confidence in the institutions vital to the protection of a free society—the independent, neutral and professional courts. I have seen countries where the power of the courts has been eroded by unrelenting political attacks. Let me tell you, when you take the independence of the judges away, all that is left is the power of guns or of money or of populist leaders or of other self interested groups.

As the centenary of the Australian Constitution approaches, we need to teach our citizens about our constitutional systems and how it works, including the High Court of Australia. We need to teach children in our schoolrooms. It also seems, sadly, that we need to teach some who should know better.

Justice Michael Kirby, August 1997

The alternative to 'progressivism' in the High Court is the doctrine of 'strict legalism'. This was well expressed by Sir Owen Dixon, Chief Justice, High Court of Australia 1952–1964 when he said:

The Court's sole function is to interpret a constitutional description of power or restraint upon power. It has nothing whatever to do with the merits or demerits of the measure. Legal reasoning is the only way to maintain the confidence of all parties. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decision in great conflicts than a strict and complete legalism. It is not the business of [lawyers] to contribute to the constructive activities of the community, but to keep the foundations and framework steady.

Other commentators defend the High Court as the institution of Australian governance which provides more continuity and certainty than the other branches. In reference to the question of extinguishment of Native Title on freehold land, South Australian Senator Nick Bolkus, Shadow Commonwealth Attorney General, said 'I would have thought a 7–0 decision three times in a row [by the High Court] gives you much more certainty than an Act of Parliament' (*The Canberra Times*, 28 November 1997).

Activity:

What perceptions do you have of the High Court? Is it a useful part of our system of governance? Does it deal with the concerns of 'ordinary' citizens? Can it be a neutral body basing its judgements purely in the law? Does the fact that its members are appointed make it undemocratic?

Which of the points of view expressed above by Professor Greg Craven, Justice Michael Kirby and Chief Justice Sir Owen Dixon do you think has merit?

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• The Mabo and Wik judgements

Two particular judgements of the High Court in the 1990s have fundamentally changed the interpretation of the Australian Constitution about matters which are not even mentioned in it. The Mabo case (*Mabo and Others vs Queensland* (no. 2) 1992) which had been commenced in 1982, in a long judgement, rejected the established principle of *terra nullius*. This principle, by arguing that there were no Indigenous inhabitants able to present a political identity to deal with, allowed the British Crown the right to take over all Australian land as its own. This was one of the prerogative rights of the Crown (see Session 4) in any colony. International law recognised conquest, cession or occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty and therefore ownership and control over the land. Thus, in Australian law as in England, the Crown claims 'original' or 'radical' title to all land, and people hold freehold land, theoretically, as tenants of the Crown. (See Republican Advisory Committee (1993) *An Australian Republic*, vol. 1, p. 145.)

In its judgement handed down on 3 June 1992, the Court held, by a six to one majority, that the people of the Murray Islands retained Native Title to their land. In reaching the decision, the Court overturned the concept of *terra nullius*, and established that Native Title had always been part of Australia's common law, although unrecognised until then.

Justice Brennan, in his judgement, said:

As the Government of the Australian Colonies and, latterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed by the Crown's exercise of its sovereign powers to grant land to

whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purposes. Aboriginal rights and interests were not stripped away by operation of the common law on first settlement by British colonists, but by the exercise of a sovereign authority over land exercised recurrently by governments. To treat the dispossession of the Australian Aboriginals as the working out of the Crown's acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.

Again, in June 1996, a High Court decision had a profound effect on the Australian political scene through its judgement (decided by a four to three majority) in the *Wik Peoples vs the State of Queensland* case. There were 35 legal counsel present, the most to ever appear in the High Court, and the finding that native title could co-exist with pastoral leases has produced an issue which is now central to the process of Aboriginal Reconciliation and Australian politics.

Activity:

Why have the High Court's decisions about native title in the Mabo and Wik cases attracted so much attention? Do you think they made their judgements based on a 'strict legalism' or a progressive interpretation of the law?

As citizens should we always 'accept the umpire's decision' in relation to High Court decisions?

• Appointment of High Court Justices

Because High Court decisions can have a very big impact on society, and there are only seven judges, their appointment is an important and sensitive matter. A 'progressive' High Court can assist a reforming government, a 'conservative' High Court can keep one in check. While political parties formally agree that the appointment of judges must be based on their legal expertise and experience appropriate to the job, this of course leaves room for exercising a good deal of discretion in influencing the make up of the Court.

For citizens this raises the issue of the way in which judges are appointed, and whether there are alternatives to the present system.

Former Queensland Premier, Rob Borbridge, was outspoken on the issue of the High Court. He has advocated a greater say by the States in the appointment of justices, constitutional changes to allow a majority of States to veto High Court judgements, the confirmation of any appointment by a referendum/plebiscite, seven or ten year terms for justices, and the creation of a new court to sit above the High Court.

In January 1998, One Nation Party leader Pauline Hanson's proposal for a non-judicial panel to supervise, or even remove, judges drew a sharp response from the Law Council of Australia:

'The One Nation Party's proposal to supervise, or even remove judges by a non-judicial panel would fundamentally undermine judicial independence', the Law Council of Australia has warned.

Council President, Brett Walker, SC, described as 'terrible' Pauline Hanson's proposal for 'lay review', which apparently threatened the removal of State judges.

Legal errors by judges in the sentencing process could and should be corrected by other judges through the appeal process.

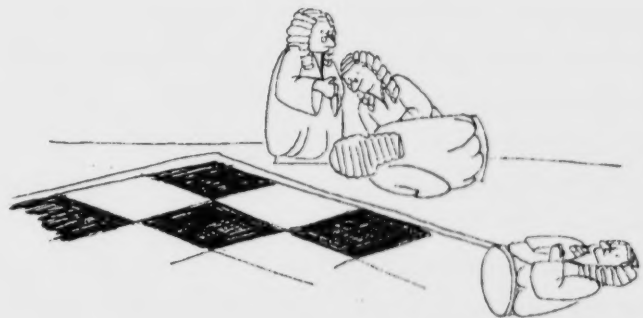
"What Ms Hanson proposes is not the correction of error, but the bullying of judges to comply with something called 'policy' which Parliament has not made compulsory," Mr Walker said.

Ms Hanson's proposal for a 'community watchdog with teeth' showed she did not understand elementary principles about judicial independence and the rule of law.

"The idea is philosophically repugnant, and, in the unlikely event it were ever taken seriously enough to be implemented, would impose a form of Executive tyranny over the Bench not seen since 1701," Mr Walker said.

The Canberra Times, 16 January 1998.

The appointment of judges with an immediate background as political figures has also raised some issues. Governments over the last 25 years have not made such appointments. The last one



was Justice Lionel Murphy, appointed by the Whitlam Government in February 1975. Murphy was Attorney-General at the time of the appointment. But there had been a history of such appointments up until then. For example, the Chief Justice in February 1975, Sir Garfield Barwick, had been appointed to the High Court in 1964 directly from the Commonwealth Parliament where he had sat from 1958-1964 as a Liberal Party member. Barwick, then Minister for External Affairs, had previously been Attorney-General in the Menzies Government.

Some considerations about the appointment of judges:

- since 1978 the States have had a formal, but not public role of participating in the selection of High Court justices. The process is co-ordinated by the Commonwealth Attorney-General who takes a recommendation to Cabinet after consulting with State Attorneys-General, and Cabinet makes the decisions;
- the Australian Constitution relies only on convention that experienced lawyers are appointed as High Court justices. It does not specify any qualifications or disqualifications for High Court justices such as those required of members of Parliament in Sections 44 and 45;
- in the USA, many judges are elected and federal judges are nominated by the President, but must have their appointment ratified by the Senate after being interviewed in public; and
- in some European countries, judges follow that career from their line of graduation and are not open to the charge that prior work in politics or any other sector compromises their independence.

Activity:

Should the process of appointing justices to the High Court be made more open to public scrutiny? Should their qualification be prescribed in the Constitution or elsewhere? (e.g. judicial experience, not to be a member of a political party, to be of a minimum age, etc.) How can their independence be ensured?

• The High Court and the 'separation of powers'

All in all, we have been let down in the protection of our fundamental liberties, by our elected Parliaments. More and more they confuse the concepts of government according to the Rule of Law, with the concept of government by laws, passed by a Parliament with a majority. They believe that an elected Parliament can do anything and Parliament is supreme. The supremacy of the Parliament may be secure vis-a-vis the King, the unelected sovereign, but the supremacy of Parliament is subject to the authority of Rule of Law and subject to Parliament acting lawfully—a very different thing. In addition we have a federal system with State and local parliaments and their Executive sectors each imagining that an electoral majority is all that is needed. Parliamentarians seem unable to grasp the distinction between a representative democracy governed by the Rule of Law, and one governed by a majority.

Peter Short, President Law Council of Australia, speaking at the Australian Legal Convention in Melbourne on 18 September 1997

Liberal democratic political and legal theory demonstrates a deep-seated mistrust of concentrations of decision-making power in political systems. The ultimate expression of such concentration is totalitarianism. Maybe such suspicion is also an Australian national characteristic, derived from past experiences of misused political influence, favouritism and even corruption, which has been a central issue in Australian political and legal systems for the last two decades.

It is expected that power will be exercised in a democratic way and open to examination to ensure that arbitrary decisions are not made, nor hidden away. This increase of emphasis on accountability has endured not only in the doctrine of the freedom of the press, but also in additional legislation like the Freedom of Information and Ombudsman Acts which now cover all the federal system in Australia.

From the highest court in Australia, the High Court ...to local magistrates' courts, ... independence from popularly elected politicians and governments is seen as essential. This is part of the rule of law.

Ultimately, democratic systems of government rely on the dispersion of decision-making power, so that there are built-in checks and balances on and between each branch of government.

Constitutional commentators have identified these as the legislative, executive and judicial branches. However, the legislative and executive powers have merged in practice due to the operation of the Cabinet system of government and the dominance of at least the lower house of the Parliament by the disciplined political party forming the government.

If it is accepted that the legislature is no longer an effective check or balance to the executive branch

of government, then this situation puts a special focus on the judicial system and its need for independence from politics. From the highest court in Australia, the High Court, which has the special role of interpreting the Australian Constitution, to local magistrates' courts, which make initial rulings on many cases of national importance, independence from popularly elected politicians and governments is seen as essential. This is part of the rule of law.

Discussion:

Does this situation in relation to the separation of powers give the High Court the status of being the most important of the three branches of government? Does this role need more safeguards in the Australian Constitution?

End of Session

As the learning circle only formally has one session to go, make sure the group allows time to fully discuss what will be happening in that session. Here are some possibilities:

- are there any visits or extra activities which you would like to do that you haven't planned or had time for?
- consider who will take responsibility for sending the evaluation sheet back to AAACE;
- does the group wish to consider working with *Kit Two—The Three Spheres of Government* of the AAACE Learning Circles Discovering Democracy programme?
- specific arrangements for the last meeting including the possibility of some social activity.

Next session:
An Australian
republic?

Background document 1

The High Court—some history

The Australian Constitution owes much to the constitutional practices of Britain and the Constitution of the United States of America. From Britain came the practice of responsible government. This system, incorporating the principle of choosing the leader of the majority of the lower house to form a government, and that government being responsible to the Parliament, became practice in the newly federated Australia.

However, the Australian Constitution left the roles and relationships of the legislative and executive branches of government somewhat blurred.

The Constitution of the United States of America completely separated these branches. The works of the constitutional authority A.V. Dicey, were well known to the Constitution framers—particularly the Tasmanian Andrew Inglis Clarke who was a keen supporter of the American system. However, the drafters of the Australian Constitution wished to incorporate not only the federal system of the USA but its idea of having a Supreme Court which would decide constitutional disputes between the States and the Commonwealth, would exercise judicial review of legislation and would be the highest court of appeal in the new nation. This blend of systems has lead some commentators to call the Australian federal system the 'Washminster' system.

The High Court was the product not only of the Constitution but also of Commonwealth legislation. The *Judiciary Bill (1903)* and *High Court Procedures Bill (1903)* which would establish the High Court and its procedures were controversial and vigorously debated.

Sir Edmund Barton, speaking at the Federal Convention Debates in Adelaide in 1897 saw the role of the High Court as policing federalism. He said the High Court would have to decide 'between the States and the Commonwealth, the validity of State laws, and the validity of Commonwealth laws which may overlap or override them'.

This view was echoed by Alfred Deakin in the new Commonwealth Parliament in 1902 (*Commonwealth Parliamentary Debates*, p. 10967)

The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others—the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the keystone of the federal arch. The High Court exists to protect the Constitution against assaults.

The creation of the High Court was delayed until 1903, opposed by those who supported Privy Council appeals, those suspicious of lawyers and politicians and those who said it was not yet necessary. The debate reflected disagreement on the central issue of constitutionalism versus parliamentary sovereignty. The Government argued that the Constitution rather than the Parliament

Background document 1

embodied the higher will of the people as the people had approved the Constitution and elected the delegates who finalised its drafting in 1897–98. Barton said:

It is in controlling transgressions beyond the Constitution, either by this Parliament or by the Parliaments of the States, that the work of the High Court will in a large measure lie. We want a tribunal composed of men who understand the people, who live amongst them, who understand the history of and reasons for our Constitution, and who are not dependent for their knowledge upon casual reading (CPD 13, 807).

The High Court of Australia has had a remarkable influence on Australia's constitutional development and general history from the time of its inauguration in 1903. Since then it has only had ten Chief Justices whereas the Commonwealth has had 26 Prime Ministers. In these terms it has lived up to Alfred Deakin's observation in 1902 that 'The High Court is properly termed the keystone of the federal arch'.

At its opening in the Banco Court of the Supreme Court of Victoria on 5 October 1903, (the federal capital was located in Melbourne from 1901 to 1927), the Commonwealth Attorney-General Senator James George Drake (1850–1941) who had been a keen supporter of the federation movement in Queensland, said 'As in the case of the United States, we believe that the decisions of this court will breathe a living spirit into the dry bones of a parchment Constitution, and that your names will live in history with those of the illustrious exponents of American constitutional law.' (*Sydney Morning Herald* 7 Oct 1903).

Sir Samuel Griffith, the first Chief Justice, a principal drafter of the Australian Constitution and Governor of Queensland from 1899 to 1903, responded less optimistically by saying 'I feel that we have undertaken most weighty and responsible duties, and as the Bar has well said, to some extent more weighty and responsible than will fall to our successors. Whether we command the confidence of the people of Australia, which, being so generously offered to us at the outset, will depend upon ourselves. But I am quite certain of this—we shall never allow any judgement to be influenced in the slightest degree by the desire to retain, or by fear of losing, that confidence'. Not only would the court be independent, but also, it would not be swayed by popular opinion nor pander to it.

Griffith was joined by only two other justices in 1903—Sir Edmund Barton and Richard Edward O'Connor (both New South Welshmen). The Court's work both in the judicial review of Commonwealth legislation and as a court of appeal and review of all Australian courts, including State Supreme Court judgements, meant a rapid increase in its workload and two more justices were added in 1906, and two more 1912. This number of seven justices (apart from the period from 1933 to 1946 when there were six justices) has prevailed to this day. In major cases they sit together, but less may sit on a matter and one justice may preside alone.

Background document 2

The High Court and the Constitution

The Judicature is dealt with in the third chapter of the Australian Constitution. Its first section, Section 71, states:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other justices, not less than two, as the Parliament prescribes.

The next clause explains that these justices would be appointed by the Governor-General in Council, could only be removed on the grounds of proved misbehaviour or incapacity and would not have their salaries diminished during their continuance of office. These requirements were seen as guarantees of judicial independence from political influence.

The High Court's functions are broadly in three areas, to:

- have original jurisdiction on matters relating to the Constitution, treaties and disputes between states;
- be an appeal court for decisions of all other courts in Australia; and
- exercise the function of judicial review of any laws made by the Commonwealth Parliament.

The separate legal systems which had developed in the separate colonies, with each having its own Supreme Court, were not diminished, apart from creating the possibility of appeals against decisions of

those courts. In fact, under Section 71, the Constitution enables the Commonwealth Parliament to give State Courts the right to hear cases within federal jurisdiction. Consequently Australia has had a dual or federal legal system from 1901, and one issue that has been discussed ever since is the advantage of maintaining this system or developing a unitary justice system in Australia.

A prime motive of the Constitution drafters in incorporating a new High Court into the Australian Constitution was the need they felt to disperse power in the political system and to defend the new federal system in Australia so that no one person or office could exercise uncontrolled powers. The first of these factors was rooted in the concept of the rule of law. This rested on the independence of the judiciary, and the concept that governments, although representing the majority at any one time, may introduce ill-advised and short term measures to satisfy that possibly temporary majority, and a strong judiciary could retard, review and control this process. This would set the rule of law against the rule of the majority. Also, although the Senate had been designed to defend the States, it was anticipated the High Court would further achieve this task. Some argued these functions were not democratic as, of course, justices were not to be elected but appointed officials, and appointed for life if they wished. Although a referendum in 1977 placed an age limit of 70 years on High Court Justices there are no other limits, other than proved misbehaviour or incapacity, to their stay in office.

Background document 2

The High Court of Australia was intended to be the highest appeal court in Australia, but all colonial Supreme Courts had allowed (and would continue after Federation, to allow) appeals to the Queen in Council (the Privy Council). When, in 1900, the Australian delegation was negotiating the passage of the Australian Constitution Bill the British ministers insisted that the right of appeal to the Privy Council from the High Court be allowed. The Australian delegation was forced into a compromise which, in Section 74, allowed appeals from the High Court on matters other than constitutional matters, and even the latter could be permitted if the High Court itself determined that the appeal to the Privy Council should be allowed. This was contentious at the time and remained so until all appeals were stopped progressively from 1975 and 1986 by Commonwealth legislation rather than a change to the Constitution. The *Australia Act* (1986) did denote the end of any further appeals to the Privy Council. A copy of the act is referred to in the Australian Constitution included in the kit.

Background document 3

The High Court and Constitutional change

The Australian Constitution is difficult to change. Section 128 allows change only if a proposal is approved by a majority of voters in a majority of States. Only eight of 42 referenda for constitutional change have been so approved, and so the Australian Constitution looks basically the same as it did in 1901. However, by its judgements, by the process known in legal terms as judicial review, the High Court has allowed great changes in the relationships between the Commonwealth and States and the nature of Australian governance.

At the time of federation the States were regarded as the primary governments of the federation, yet approaching the centenary of federation the Commonwealth clearly is more influential. The powers of the Commonwealth had been clearly set out in the Constitution on the understanding that the States had powers over all other matters. The listing of Commonwealth powers was intended to limit them, yet although the Constitution has not been substantially changed this power balance has clearly tipped to favour the Commonwealth. How did this happen?

The constitutional rights of the States in the federal compact were defended, but this was always against the background of arguments in favour of more central power in the Australian federation. For example Alfred Deakin commented in one of his anonymous *Morning Post* articles when Prime Minister in 1906:

The ardent and aspiring federalists who look forward to the time when every truly national function shall be in the hands of the Federal

Government while the States and their courts shall be restricted to subsidiary local affairs have no more zealous and consistent ally than the present Prime Minister.

(See Alfred Deakin, *Federated Australia* pp.187-8).

In that same year the two new appointees to the expanded High Court, Justice Isaac Isaacs (later to be the first Australian-born Governor-General) and Justice Henry Bournes Higgins, were both ardent federalists and political radicals, intent upon expanding Commonwealth powers. They looked forward to a more integrated nation with a dominant national government.

The High Court case of *Fairey vs Burdett* (1916) upheld the Commonwealth's powers under the *War Precautions Act 1914-16* that the Commonwealth Government could fix bread prices in Victoria and gave the Commonwealth Government virtually dictatorial powers 'for the more effectual prosecution of the war'. The High Court upheld all of the Government's regulations including the detention of suspects, deportation of aliens, confiscation of aliens' property, and prevention of propaganda prejudicial to enlistment. However, governments find it easier to extend their powers in wartime, when official censorship and the suspension of democratic rights occurs.

The Engineers Case of 1920 marked a break from the doctrine of implied immunities and extended Commonwealth power in the industrial area without any changing of the wording of the Australian Constitution. The young Victorian barrister Robert Menzies (1894-1978) argued on behalf of the

Background document 3

Engineers Union for the extension of Commonwealth power over industrial relations in Western Australia, by arguing that State owned enterprises, like timber mills, were trading companies and not State instrumentalities. This directly challenged the right of the State to govern its affairs, for although, in Section 51 (xxxv) the Constitution gave the Commonwealth power to resolve industrial disputes which extended beyond State borders, this case was restricted to one State. Consequently Commonwealth industrial awards became established alongside the state system and the ability of the Commonwealth to set levels for working conditions and wages grew rapidly. This case is a key example of judicial interpretation of the Constitution which effected constitutional change without changing the wording of the Australian Constitution.

The Uniform Tax Judgement of 1942 was another such milestone. The power to raise money through taxes is a vital one for any government and during the Federal Convention debates of the 1890s there was no general agreement about the matter. However, it was felt that the revenue produced by an Australia-wide customs duties would provide adequate finance for the fledgling Commonwealth Government after three-quarters of the total raised was returned to the States. But the functions of the Commonwealth Government had multiplied and its size and cost had grown. It sought new sources of money and introduced Income Tax and Sales Tax in the 1930s. Income taxes were concurrently collected by the State Governments, and the Commonwealth passed legislation to impose income tax. The States claimed this move was unconstitutional but in 1942 the High Court judged the Commonwealth had the

power to levy income tax relying on its defence power, in war-time. However it did not outlaw State income tax collection. It is politics, not the Constitution or the High Court which stops States imposing income tax at the present time.

The Tasmanian Dams Case of 1983 was equally controversial. In 1983 the Commonwealth Parliament passed an Act preventing the construction of a dam on the Franklin River in Tasmania. It argued that its ratification of the 1972 Convention for the Protection of World Cultural and Natural Heritage gave the Commonwealth Government the right under Section 75 of the Constitution to regulate the use of such land. Section 51 (xxix) of the Constitution gives the Commonwealth the power to legislate for external affairs and Section 75 simply says 'In all matters—(1) Arising under any treaty the High Court shall have original jurisdiction'.

In the 1890s, when the Constitution was being discussed and drafted, international treaties were expected to deal with matters like defence, trade and immigration, but by the 1980s international treaties dealt with an increasingly varied range of subject including the environment and human rights.

The effect of this case was to enable the Commonwealth Government to control land use in the States, where that land was declared as a World Heritage site—an area which had not been included in the Commonwealth's list of powers in 1901. Critics argued that the Commonwealth would be able to use the external affairs power to control any aspect of State Government so long as the Commonwealth was a signatory to a treaty on the matter. They predicted that the most fundamental and trivial of matters would be controlled from Canberra.

Background document 3

Formal and interpretive constitutional change:

It is as one of the organs of government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the Court moves by gradual, often indirect, cautious, well-considered steps, that enable the past to join the future, without undue collision and strife in the present.

Alfred Deakin's 1902 Speech introducing the Bill to establish the High Court

The formal way of changing the Constitution is by referendum as set out in Section 128. However, by interpreting the Constitution from 1903 the High Court has, in fact, made many constitutional changes without altering the wording of the Constitution. Sometimes this arises from the situation where the wording of the Constitution is unclear, or there are contradictory sections. For example in 1975 the High Court agreed that senators could be elected for each of the two mainland territories, under the territories power in Section 122 of the Constitution, despite the requirement in Section 7 for the Senate to be 'composed of' senators from each State.

One debate that has been central to constitutional interpretation from 1903 is whether the Constitution should be interpreted literally as a legal document or whether its history and the intention of its framers should also be considered. Samuel Griffith, Chief Justice from 1903 to 1919 said in his judgment in *Baxter's Case* (1907) 'It is true that what has been called an 'astral intelligence', unprejudiced by any historical

knowledge and interpreting a Constitution merely with the aid of a dictionary, might arrive at a very different conclusion as to its meaning from that which a person familiar with history would reach'.

More progressive views were also advocated by commentators on the High Court and some justices. For example, Isaac Isaacs, a member of the Victorian delegation to the 1897 Constitutional Convention and a Justice and Chief Justice of the High Court from 1906–1930, after which he was appointed Governor-General in 1931 made the following comments in the judgement in *Commonwealth vs Krelinger & Fernau Ltd* (1926):

It is the duty of the judiciary to recognise the development of the nation and to apply established principles to the positions which the nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community and act as a clog upon the legislative and executive departments rather than as an interpreter.

As a living, co-ordinate branch of government, [the Court] cannot stand still and refuse, in interpreting the law, to recognise the advancing frontiers of public thought and public activity.

More changes have been made to the Australian Constitution by interpretation than by formal amendment. How democratic is this process?

Web site <http://www.austlii.edu.au> has all the decisions of the High Court—6500 decisions, 1047 in full—including *Wik* and *Mabo*).



Session

6

AN AUSTRALIAN

Republic?

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DISCOVERING
Democracy

The Governance of Australia ~ Kit 1



• Introduction

The aim of this session is to discuss an important question of Australian governance—should Australia become a republic or continue as a constitutional monarchy? This discussion includes examining some of the symbols as well as the substance of our constitutional system.

The activities in the session guide will help you explore and discuss the following:

- the difference between constitutional monarchy and republican systems
- the role of the Crown in Australian governance
- who should be Australia's Head of State?
- whether Australia should have a Head of State as well as a Head of Government
- what the various general republican models are
- what the States may do about an Australian republic
- what specific changes are necessary in the Australian Constitution for Australia to become a republic
- how Australian citizens were involved in the 1999 debate and referendum
- is there a case for another referendum, and, if so, when.

The suggested activities are only a guide. Read the session guide before the meeting and then decide at the beginning of the session how the time will be spent. The material in this session guide could be discussed in more than one session, or used earlier in the learning circle.

Suggested activities

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Resources

Australian Electoral Office, <i>Yes/No: Referendum '99, Your official referendum pamphlet</i>
Commonwealth Government, <i>Referendum, 6 November 1999: Which way do you want to go?</i>
Constitutional Centenary Foundation, <i>Referendum on the Republic: Questions and Answers</i>
Parliamentary Education Office, <i>Should Australia become a republic in 1999?</i>
Department of the Parliamentary Library, <i>1999 Referenda—Summary of Results, Information and Research Services, Research Note, 19, 1999–2000</i>

• Australia's constitutional monarchy

Since 1901 Australia has been a constitutional monarchy. Prior to that the Australian colonial governments were also constitutional monarchies and the British monarch continues to be the constitutional head of each of the Australian states. Background Document 1 provides considerable details about the development of the British monarchy and its connections to Australia.

Some general points are:

- the popularity of the British monarchy at the time of the first visit by a reigning monarch to Australia in 1953.
- the regular visits of royal figures to Australia since that date, including the opening of the Melbourne Olympic Games, the Sydney Opera House and the new Commonwealth Parliament House in 1988.
- the creation of the title of Queen of Australia in 1953 and its confirmation in 1973.
- the policy of the British/Australian Queen not to be involved in Australian constitutional disputes.
- the continuing role of the Queen to formally appoint the Australian Governor-General.
- the ceasing of the practice of the issue of letters patent by the monarch to the Governor-General.

Is the monarch British or Australian?

A central aspect of the case of those Australians who support an Australian republic, is that the monarch, currently Queen Elizabeth II, is British and that the monarchy is a British institution. During the 1999 referendum campaign the Australian Republican Movement put it this way:

"In 1999 Australia is a mature, independent democracy. Yet our highest office is still held by the British Monarch. It's time we had a Head of State who is one of us".

Monarchists, on the other hand, argue that the monarchy is now an Australian institution. They say that over the past century and more the monarchy has become an Australian tradition and that this has been formalised by the creation of the title Queen of Australia. They deny that there are any remaining legal links between Australia and Britain: "All legal links with Britain were cut in 1986 with the passage of the Australia Act through both Australian and British Parliaments".

This dispute became *an* issue in the process of deciding on the referendum question to be put to the Australian people. The YES side wanted reference to the creation of an Australian head of state and to the replacement of the 'British' monarch. The wording originally suggested by the Government made no reference to nationality. The Select Committee suggested "Australian president" but made no reference to the 'Britishness' or otherwise of the Queen. The final compromise version was that the official referendum question made no reference to the nationality of any of the office-holders.

Discussion:

Is the monarchy British or Australian?

Does the Queen serve Australia well?

Does the Governor-General serve Australia well?

• Should Australia become a republic?

The group may have already discussed this question before reaching this session! For some it is an emotional issue as people may have *strong* emotional bonds with the monarchy or with the idea of a republic. Others may wish to consider both systems, and the alternatives within the republican framework, and then make a decision. Even when a decision is made it needs to be tested against the social realities of Australia at the beginning of the 21st century and the practical requirements needed to achieve change.

People with feelings of loyalty to an existing system of constitutional monarchy or to a particular monarch are often challenged by those who have equally strong feelings for change.

However, both sides also have to take account of detail. Sometimes details are used to make it appear that change is impossible. At other times the parading of detail is used to impress and overwhelm opposition. The debates of the 1998 Constitutional Convention and the 1999 referendum campaign sometimes reflected these tactics.

Republican models

In modern times the term 'republic' has come to mean a state which is governed by office holders elected by constitutional means rather than by a hereditary monarch. There are four basic models of republican Constitution used by democratic countries today:

The parliamentary executive model

This model has a Head of State either elected by Parliament (as in Germany) or by all voters (as in Ireland). The Head of State is usually called a President and has limited powers usually to do with summoning Parliament. Even popularly elected ceremonial presidents usually do not take part significantly in the political life of their country as this could create major tensions between the president and elected government.

The Prime Minister is responsible, along with the other ministers, to the Parliament. In effect, the parliamentary executive model would be the one for an Australian republic if the existing role and powers of the Governor General were given to an Australian president, apart from the problem of the reserve powers. The German republic may be a relevant model for Australia because a federal system of government operates in Germany.

The executive presidency

This is the constitutional arrangement which exists in the United States of America. The president is both the head of state and head of government. The presidential oath, administered by the Supreme Court is to the American people where the sovereignty of the American Constitution and political system lies. The president is popularly elected but is not a member of congress—the houses of Parliament. Secretaries of State—the equivalent of senior ministers in a parliamentary system—are appointed by the president from outside the congress. Neither the president nor cabinet are directly responsible to congress.

Effective government depends upon the president being able to persuade Congress to pass laws (including financial appropriations) to implement the policies he has for the running of the government and country. Congress, which has a fixed term and cannot be dissolved by the president, may in certain circumstances, pass laws that the president may oppose.

Discussion:

Which model, if any do you think would best suit Australian conditions? Are there other alternatives?

At the Constitutional Convention four republican models were considered:

- The 'McGarvie' model which would replace the Queen with a council of three 'elders' with constitutional experience who would appoint the president on the prime minister's advice. However, the president could be dismissed by the prime minister.
- The Australian Republic Movement model, adopted with some revisions by the convention and later incorporated into the 1999 referendum bill, which included popular nomination to Parliament which would endorse by a two thirds majority a single nominee. The president could be dismissed by the prime minister and parliament.
- The parliament would choose three nominees to be voted on by the Australian electorate. Dismissal by a simple majority of Parliament.
- The direct nomination and election of an Australian president. Dismissal would be by a majority of the House of Representatives.

The hybrid executive model

This system operates in France. It divides power between a president, who is popularly elected for a seven year term and a prime minister. The president appoints a prime minister from the National Assembly (Parliament) who then becomes the head of government, but who is responsible both to the National Assembly and to the president. This arrangement has existed since a referendum ushered in the Fifth Republic in 1962. It was intended to provide a balance between executive and legislative power.

In practice, the powers of the French president are very considerable, and exceed the power of the American president. The seven-year period of office makes it easier for a French president to survive periods of unpopularity, and the powers of the president in relation to the National Assembly have no equivalent in the United States.

The collective executive model

This system operates in Switzerland, and some of the founding fathers wanted to adopt it, along with the concept of constitutional change approved only by referendum, in 1901. The Parliament elects an executive council which in turn elects its president who acts as head of state. Once a council is appointed, it remains in office for the term of a parliament.

Discussion:

Do members of the group think that Australia should become a republic? If so, why?

In view of the defeat of the 1999 referendum when, if ever, would it be appropriate to hold another one.

What factors should govern when, rather than if, Australia should become a republic?

• Choosing a Head of State: popular election

Opinion polls show that a significant majority of Australians favour the direct election of the head of state of a new republican government. As a consequence many observers believe that the 1999 referendum would have passed if the republican model on offer included direct election of the president.

This seems to be a simple and sensible demand for maximum participation—democracy—in the selection of the head of state. Advocates claim that it would lead to a rejuvenation of popular respect for the constitutional and political system. They argue that international examples, such as the direct election of the Irish president, show that it is workable. Furthermore, they claim that, in a general sense it would 'open up' the political system. They argue that this is much better than a system in which the government of the day, the major political parties and the parliament effectively appoint one of their own, one of their political 'mates'.

At the time of the 1999 referendum the advocates of direct election did not have the option of a direct election republican model (although two direct election models were considered at the Constitutional Convention). That could be a task for the future. Some advocates also see such a constitutional change as being a precursor to other changes, such as a Bill of Rights or abolition of the Senate.

However, some powerful arguments have opposed such popular or direct election, and support instead election by a 'super-majority' of members of Parliament. The main arguments against direct election are:

1. it would create a powerful new political office, with great potential for future conflict between the president and the prime minister
2. direct election *guarantees* the introduction of party politics to the office of president. The capacity of the Head of State to act as an impartial and uniting force 'above politics', would be lost
3. to ensure that an elected president only has non-executive powers, the powers of the president would have to be codified.

It can be argued both that the cause of democracy is best served, or that it is undermined by direct election of a president!

Discussion:

Consider all the pros and cons of having a directly elected president. What do members of the group think? Would you like to vote for your President? Do you think that is a more democratic arrangement? Does it matter?

• Heads of State and Heads of Government

The positions of *Head of State* and *Head of Government* may be held by the same person or two different people. In a constitutional monarchy the positions will always be held by two different people—the king/queen and prime minister. In a republic they are sometimes held by the same person (eg USA) and sometimes by two different people (eg India, Ireland and France). Australia's Prime Minister regularly attends Commonwealth Heads of Government Conferences. (See *Background document 4* for an interesting treatment of these terms).

An example of the confusion that can exist occurred as Australians were considering which Australian office-holder should open the Sydney Olympic Games: the Queen, the Governor-General or the Prime Minister. The Olympic Rules specify that the Games shall be opened by the Head of State, but few in Australia wished the Queen to officiate. At first the Prime Minister, the Head of Government was to perform the function but it was eventually decided that it would be more appropriate if the Governor-General, the Queen's representative, did so.

Discussion:

The contemporary Australian constitutional debate has focused on the Head of State question. Some points raised have been:

- what should the position of head of state be called?
- should the head of state's current powers be changed?
- should the head of state's powers be 'codified'—that is clearly written down in the constitution ?
- should the Australian head of state be required by the Constitution to be an Australian?
- should there be specific requirements for someone to be considered for the position e.g. those applying to members of Parliament as detailed in section 44 of the Australian Constitution?
- should the Australian head of state be only a ceremonial figurehead?
- do we need a head of state at all?
- what necessary functions do they perform?

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• Steps for change

There are two alternative approaches to change. Each necessarily culminates in the processes laid down in the Constitution for constitutional change.

The first is the approach that was followed in the lead-up to the 1999 referendum. Recall the steps.

- First a model is agreed upon through the mechanism of a constitutional convention.
- Then a bill is passed by both houses of parliament.
- Then, under the arrangements outlined in section 128 of the Constitution, a referendum is held.
- Should the referendum have been passed the Australian Constitution would have been changed.

The alternative approach begins with a different approach to finding agreement on a model.

- First a plebiscite (that is, a non-binding vote of all citizens) is held on whether, in principle, Australia should become a republic.
- Then a second plebiscite is held to determine which republican model is proposed.
- Then a bill is passed by both houses of parliament.
- Etc. etc (as above).

Optional extra activities:

Contact a delegate to the Constitutional Convention from your state/territory and invite them to come and meet with the learning circle to talk about their experience, how they voted, and why. Contact a member of either the Australian Republican Movement or Australians for Constitutional Monarchy (or one of the other groups) and invite them to come and meet with the learning circle to talk about their experience of the 1999 referendum campaign.

• What about the Australian States?

Each Australian state has a Head of State appointed by the British monarch, and they exercise the formal powers under each separate state constitutional arrangements. However, if Australia was to become a republic, it would be logical, though not necessary, that the states would also make that change. Some state constitutions require that a referendum be held to make such a change, while in others the state parliament could do it.

It is interesting that the Australian Capital Territory manages without its own head of state. Proximity to the Governor General has allowed it to use that person, acting under the authority of its Self-Government Act, to dissolve the Legislative Assembly if it were found to be 'conducting its affairs in a grossly improper manner'.

Modern communications would allow the Australian head of state to act to overcome any constitutional deadlocks and perform the more routine tasks of dissolving parliaments, issuing writs for elections and calling on the electoral victors to form a government. Even in Australia's greatest constitutional crisis in 1975 the Governor General himself did not read the declaration dissolving parliament. His staff could perform these functions under his direction by travelling inter-state.

Discussion:

Should the states also become republics? What is the position of your present state or territory government on this question? What would happen if the Commonwealth became a republic and one or more of the states did not?

Should the states continue to have Governors? What should they be called and how should they be appointed? Should they be Deputy presidents?

Is it likely that a state would wish to continue as a monarchy even though the Commonwealth of Australia did not?

How is each state constitution changed?

How many states would have to have a state constitutional referendum?



• Should there be a Head of State or President?

There has always been a school of opinion that the Governors General (and the Queen) are merely an expensive appendage of the political system, hosting and attending state banquets and cocktail parties with the diplomatic corps or other VIPs, or opening fetes and art exhibitions. As these functions are performed at considerable public expense without any apparent benefit to the ordinary taxpayer, then it is argued the whole institution should be scrapped.

The first Governor General, Lord Hopetoun, resigned in April 1902 because the Federal Ministry would not agree to increase his salary of 10,000 pounds a year by an extra 16,000 pounds. He had been given an extra 10,000 pounds in his first year of office because he argued he could not meet the expenses of hosting the Duke of York and his entourage during the inauguration of the Commonwealth. This apparent extravagance was lampooned in *The Bulletin* whose anti-British and anti-aristocratic opinions were shared by many Australians of that era.

Gazing at the spacious grounds and residence of the Governor-General at Yarralumla from the viewing platform is a standard part of the itinerary of tourists visiting Canberra. The Governor-General's other official residence is Admiralty House on the shores of Sydney Harbour. Occasionally there are open days at these residences when citizens may walk around the grounds. Others visit the Governor-General's residences to receive honours, awards and other acknowledgments of their achievements and to be entertained. Foreign diplomats and government representatives are regularly invited to the Vice-regal residence. The Governor-General regularly

travels within and outside Australia to perform his ceremonial duties which are announced in the vice-regal column of the daily press.

Apart from these ceremonial duties the Governor-General performs constitutional duties which include attending Executive Council meetings, swearing in of Commonwealth Ministers and attending the opening of parliament and formally dissolving it before an election.

The costs of maintaining this element of Australian governance in 1998/99 was \$8,443,000. Some suggest this is a high cost to maintain a largely ceremonial position. This was the logic of the New South Wales government's decision to limit the role of their current governor, Gordon Samuels, who maintains his own career and lives in his own house rather than Government House. He performs his constitutional duties and attends limited ceremonial functions. This arrangement has considerably reduced the costs of the position.

Discussion:

Can Australia do without a head of state completely? If so, how could the constitutional responsibilities of the head of state be discharged?

• The republic and governance

If Australians agree that an Australian republic should be established, then there are several questions that should be discussed:

1. Should the President be appointed or popularly elected?
2. Should the parliamentary system be changed to have an executive president like the United States of America or France?
3. If we maintain the current parliamentary system and continue to draw the Prime Minister from the Parliament how will a person be nominated for the position of president? Will a president be elected by a popular vote, or by the votes of members of Parliament only? Should the state Parliaments have some say in this choice?
4. How long should a president hold office, and on what conditions could they be removed and by whom?
5. Should the president have the same powers as the current Governor General—both as outlined specifically in the Australian Constitution and the reserve powers, or should he or she be a ceremonial figurehead only? If the reserve powers are passed on to the new president, should they be clearly written in the Constitution?
6. Should Parliament have the power to remove a president? If so, on what grounds?
7. Since the passage of the Australia Act in 1986, State governors are appointed by the Queen on the recommendation of state premiers. Should the president appoint state governors of any states who choose not to become republics?
8. Should the move to a republic be used as an opportunity to radically modify the Australian Constitution and include a Bill of Rights? If so, what should be included in such a Bill of Rights?

Discussion:

Consider the above list of questions and choose one or two to discuss. How did the 1999 Constitutional Amendment Act answer these questions?

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• Rewriting the Constitution

The 1999 Referendum Act included the detailed changes to the Constitution necessary for Australia to become a republic. They are included in the official Australian Electoral Commission booklet. See *Resources*.

Opponents of the Act focussed attention on the 69 changes proposed. Defenders of the Act argued that most of them were minor drafting changes in which the words "Queen" and "Governor-General" were replaced by the word "President" (see, for example *Sections 1 and 5*).

Discussion:

Examine the 1999 Act.

- What types of changes are involved?
- Are most of them minor or major changes?
- Can you point to examples of minor and major changes?

• The 1998 Constitutional Convention and the 1999 Referendum

The Constitutional Convention

After two weeks of debate from the 2nd to 13th February 1998 (available on the Internet at Hansard <http://www.dpmc.gov.au/convention>), the Constitutional Convention supported, in principle, the change to a republic (89 votes for 52 against and 11 abstained), and by a slimmer margin voted in favour of a particular republican model (73 for, 57 against, 22 abstained).

This model, which was based on the Australian Republican Movement's model, had the following features:

- popular nomination by State and Territory Parliaments, local government, community organisations and individuals or persons who are Australian citizens qualified under the Australian Constitution to be a member of the House of Representatives
- short-listing by a confidential government committee for consideration by the Prime Minister
- the Prime Minister presents a single nomination, seconded by the Leader of the Opposition to a joint sitting of Parliament
- approval of a single nominee by a two thirds majority of Parliament
- the president would have the same duties as the Governor General

- the term of office would be five years
- the president could be dismissed by the Prime Minister, ratified within 30 days by a simple majority of the House of Representatives.

The Prime Minister, John Howard, declared that this constituted the 'clear view' of the Convention and it then recommended to him that the choice to become a republic based on this model should be put to the Australian people in a referendum. That motion was carried 133 for, 17 against with 2 abstaining.

Consequently, John Howard declared on the same day that if his government won the Commonwealth election due before April 1999 a referendum would be held in 1999. If passed, that would enable Australia to become a republic on 1st January 2001.

The 1999 Republic Referendum

The Republic Referendum was held on 6 November 1999, approximately 21 months after the Constitutional Convention. The republican model put to the people was the one recommended by the Constitutional Convention. Ultimately the referendum was defeated by a margin of 55% to 45%. In the intervening period there were considerable developments.

The Coalition government, led by the Prime Minister, John Howard, was re-elected on 18th October 1998. Upon re-election the government

made clear that the proposed referendum would proceed. A little later the Prime Minister also announced that the republic referendum would be accompanied by a referendum to consider a new Preamble to the constitution.

Two processes were involved in arranging for the republic referendum. The first was to pass the necessary legislation after public consultation. The government released an Exposure Draft of the Constitution Alteration (Establishment of Republic) 1999 Bill on 9th March. On the same day it released the Exposure Draft of the Presidential Nominations Committee Bill 1999, a bill which would set in place the mechanism, by which a committee would be selected to advise the Prime Minister on nominations for president. Public responses were invited to both draft bills.

The government also set up a Joint Select Committee on the Republic Referendum to advise it on the two bills. This committee asked for public comment, held public hearings and submitted its report in August 1999 prior to the parliamentary passage of the bills during that month.

The second process involved supporting public involvement in, and structuring the conduct of, the referendum campaign. In February 1999 the government announced an initiative that had never previously been undertaken. It would fund 'YES' and 'NO' committees, composed often of members chosen from among Constitutional Convention delegates (both nominated and elected), with a grant of \$7.5 million each to undertake the task of putting the YES and NO cases to the public. This would assist in promoting community debate and in ensuring that all relevant issues were canvassed. The YES committee, chaired by ARM head, Malcolm Turnbull, included members of the Australian Republican Movement and other republicans. The NO committee, chaired by ACM

head, Kerry Jones, included members of the Australians for Constitutional Monarchy and other monarchists as well as two prominent direct election republicans, Ted Mack and Clem Jones from the Real Republic group.

The government also allocated \$4.5 million to a public education programme. This was to be a factual, neutral programme explaining the current constitution, the referendum process and the Constitutional Convention's recommended republican model. It would be timed for September in order to precede the campaign proper. It was to be overseen by an advisory committee chaired by Sir Ninian Stephen, the former Governor-General.

The referendum itself would be conducted as usual by the Australian Electoral Commission. Their responsibilities included, as well as organising the voting itself, the distribution of the official 'YES' and 'NO' cases to all voters during October. These formal statements, officially the responsibility of those parliamentarians who supported and opposed the referendum bill when it passed the parliament in August, were prepared by the 'YES' and 'NO' committees. See *Yes/No. Referendum 1999, Your official referendum pamphlet* in RESOURCES KIT.

The referendum process was controversial from beginning to end. Each side saw advantage to the other in various aspects of the proceedings. The wording of the long title of the bill, which would become the referendum question itself, was hotly disputed in ways that gave clues to the campaign to come.

The government's original proposal was: "A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by a two-thirds majority of the members of the Commonwealth Parliament". This was found wanting by the Joint Select Committee

which recommended: "A Bill for an Act to alter the Constitution to establish the Commonwealth of Australia as a republic, with the Queen and Governor-General being replaced by an Australian President". Eventually the compromise bill spoke of: "...a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament".

The government's public education campaign was also criticised by the YES committee for allegedly misrepresenting the extent of constitutional change involved. The public advertisements presented the changes to the constitution as more dramatic than the proponents would admit to. See *Referendum, 6, November 1999: Which way do you want to go?* in RESOURCES KIT.

Finally, the official cases and the campaign that followed revealed almost no common ground between the two sides. First, there was little or no agreement about the status quo. In particular, there was no agreement about the role of either the Queen or the Governor-General. Secondly, there was considerable difference of opinion about the consequences of the proposed republican model. The official cases can be found in the AEC pamphlet. See RESOURCES KIT.

The primary argument for the YES case was the need for an Australian head of state. As the official case said: "Becoming a Republic simply means having an Australian as Head of State instead of the Queen". This argument was blunted by the NO rebuttal that the Governor-General rather than the Queen was the Australian head of state. The Queen, so this argument went, was something else—the sovereign. As Australians had held the Governor-General's position since 1965 the effect of this argument was to weaken the YES case. In the words of the official NO case: "Our

constitutional Head of State, the Governor-General, is an Australian Citizen and has been since 1965".

The NO case, led by its republican members, also focussed on the republican model. Two elements of their argument appear to have been especially effective. The first condemned the model as the "politicians republic". According to the official No case: 'The proposed republic gives more power to the politicians, at the expense of the people. We should not hand over any more power to politicians hammering out deals in secret behind closed doors'. This argument tapped into anti-politician sentiment in the community. It appeared no answer to say that the Governor-General is recommended (effectively appointed) by the Prime Minister. What's more, said the NO advocates, the government of the day would effectively be able to dismiss the president without effective safeguards: 'easier for a Prime Minister to sack the President than his or her driver'.

The second element emphasised 'Say No to this republic', implying that there was a better model, perhaps a directly elected president, that might be put to the people at a subsequent referendum. The official No case described the model as "an inadequate and undemocratic republic" and a "third-rate republic".

On 6 November Australians voted to reject the referendum proposal by a margin of 55% to 45%. The referendum was defeated in all six states. Only the voters of the ACT voted in favour of the proposal. At the same time a second proposal, for a new Preamble to the Constitution, was rejected even more comprehensively (61% to 39%). See *1999 Referenda—Summary of Results* in RESOURCES KIT.

Immediately various explanations were advanced to explain the result. What can be said is that, when the voting is broken down by House of

Representatives electorates according to region, party status and socioeconomic status, then only among metropolitan voters and voters of high economic status was there a YES vote.

The immediate future of the proposal for a republic is unclear. The only concrete step that has been proposed has come from the Leader of the Opposition, Kim Beazley, who has committed the Labor Party to holding a series of plebiscites to test public opinion. If he were successful at the next federal election, due in October 2001, a plebiscite to test whether Australians favour a republic in principle would follow, perhaps at the time of the following elections,

The major community organisations, such as ARM and ACM, are planning to maintain their organisational capacity to participate in whatever eventuates. Many people in parliament and in the community are still interested. The issue of the republic remains alive.

Discussion:

What were the main features of the campaign?

Were both sides of the argument put fully and fairly?

What did the main groups and political parties do?

Did you feel properly informed?

How would you like a future campaign to be conducted?

Are there particular features that you would like either added or deleted?

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• End of session

- Gather all sessions guides and resources together so that another learning circle can use the kit.
- Make arrangements to complete and return the evaluation form to ALA.
- Finalise arrangements of the group is continuing on the Kit Two—The Three Spheres of Government.
- Consider the possibility of some other learning activity in the area of civics and citizenship education—either as a learning circle or individually.

Background document 1

The development of the constitutional monarchy in Great Britain and Australia

The development of a constitutional monarchy in England, and later Great Britain, was a process that lasted many centuries, and is still continuing. The role of the monarchy in Great Britain, and its corollary, the unelected House of Lords, are actively debated, and current polls show about 27% support for a republic in Great Britain. Ironically, following a bitterly fought Civil War between the Royal and Parliamentary forces which the latter won, England had a period of republican government from 1649 to 1660 after the parliamentary leaders had tried and executed King Charles 1 for high treason and established the Commonwealth under the leadership of Oliver Cromwell. Although the monarchists gained control again in 1660 their constitutional powers were slowly limited by a series of agreements, especially the Bill of Rights in 1689.

The Bill of Rights was not a progressive statement of citizens' rights, but a statement of the rights of Parliament to share power with the monarch after they had forced James II into exile and invited the more compliant Dutch aristocrat William of Orange to be King of England. It also established the ascendancy of the protestant religion constituted in the Church of England. The central political contention was the right of the monarch to summon and dismiss Parliament and their exercise of executive power both when Parliament was sitting and when it was not. Monarchs had maintained armies, declared wars, introduced taxes and played a determining role in the legal system. Slowly these powers were shared between the executive (monarch and ministers),

legislative (Parliament) and judiciary (courts) areas of government, but the highest court remained the Privy Council, drawn from the House of Lords.

During her long reign from 1837 to 1901, Alexandrina Victoria (1819–1901), the only legitimate child of the Duke of Kent, the fourth son of George the Third, achieved a higher degree of popularity for the Crown than had her Hanoverian predecessors. She remained intimately involved with the business of government for over sixty years, especially after the death of her cousin and husband Prince Albert of Saxe-Coburg Gotha in December 1861. It was during her reign, and partly because of it, that Walter Bagehot's famous work *The English Constitution* was published and both it and the Queen exercised great influence over the Federation fathers in the British colonies in Australia. The British Crown had never been so stable and continuously popular, the British system of government never so praised when compared to the political turmoil of 19th century Europe. If further proof was required of the superiority of this system, despite the slums of her great industrial cities, Great Britain ruled a huge Empire stretching around the globe, her Queen was also Empress of India and her preeminent Royal Navy sailed where it wished and did what it wanted. It was the Land of Hope and Glory.

Being part of the British Empire influenced the outlook of the residents of the Australian colonies at the time they were considering federation into an Australian nation:

Background document 1

- they felt their defence was secured by the Royal Navy and they were obliged to assist the mother country in her military activities
- the success of the British Empire and Britain's parliamentary system was a source of pride; and
- the population of the Australian colonies was overwhelmingly British with many of the residents being British-born migrants.

An Australian as Head of State

Few doubt that constitutionally and legally the reigning monarch of Great Britain (as long as he or she is a legal heir or successor of Queen Victoria—a requirement of the Preamble to the Australian Constitution) is the Australian Head of State. The Britain and Northern Ireland and Australia and many other places, declares this on her Internet Home Page. (<http://www.royal.gov.uk>)

However, it was recognised by the framers of the Constitution that maritime communications with Great Britain was difficult and slow in 1900, although telegraphic contact had been possible with that country from Australia with the heroic completion of the overland telegraph line from Adelaide to Darwin in 1872. That line linked with a submarine cable from Java which was already in telegraphic communication with Europe. One of its first uses was to send a telegram from Windsor Castle to Adelaide confirming the knighthood of Charles Todd, the South Australian Postmaster-General who had supervised the Overland telegraph project. Thirty years after federation, the telephone used for domestic services since 1880, was used by Prime Minister James Scullin to make the first international phone call from

Australia.

So although Windsor Castle was not far from the British Houses of Parliament, the situation for Australia in 1900 ensured that the practical activities of dissolving parliament, issuing writs for elections, announcing the results of elections, attending Executive Council meetings and selecting Ministers from the newly elected Parliament fell to the Queen's representative in Australia—the Governor General.

Initially there was no argument that this role would be filled by a Briton. Queen Victoria chose John Adrian Louis Hope, 7th Earl of Hopetoun, a Scottish aristocrat who had impeccable imperial qualifications and had previously been Governor of Victoria from 1889 to 1895. He had been educated at Eton and the Royal Military College at Sandhurst, England, and after graduating he held various positions in England, including lord-in-waiting to Queen Victoria. He sailed, along with the Duke of York (later to be King George V), to Australia to represent his Queen at the proclamation of the federation of Australia, to choose the first Commonwealth ministry and to call and supervise the first election for the Federal Parliament and its subsequent opening. He immediately gave the infant Commonwealth its first constitutional crisis.

This was called the Hopetoun Blunder. He sent for William Lyne (1844–1913) the Premier of the senior colony of New South Wales and consistent opponent to Federation, to form the first Commonwealth Ministry, but Lyne could not find enough support. After he returned his commission, Edmund Barton, a notable Federation Father, was commissioned to form a government, which he did and thus became Australia's first prime minister. The Earl of Hopetoun

Background document 1

action immediately raised questions about the inter-relationship of Imperial officials, local politicians and the use of the Governor General's executive powers granted under section 61 of the new Constitution.

British monarchs continued to choose Governors-General without reference to the Australian government until 1930 when Prime Minister James Scullin vigorously advocated that the then monarch, George V observe the agreement reached at the 1926 Imperial Conference, that an Australian, (Sir) Isaac Isaacs be appointed as Governor General on the advice of the Australian government. Isaacs was appointed. Although there were many more British Governors-General after him, since the appointment of Richard Casey as Governor-General in 1965 an office he held until 1969, only Australians have been appointed to the position.

This trend has meant that, during the 1999 referendum campaign some monarchists claimed that our Governor General is the Australian head of state and further, that therefore there was no need to change the Australian Constitution.

These developments mirror the evolving independence of Australia from Great Britain in the conduct of her international affairs. Upon Federation, in 1901 Australia was regarded as a subordinate part of the British Empire, and although she was capable of providing her own government in domestic matters, she would follow the lead of the British Government in international affairs. This meant that Australia did not start its new national life with a foreign minister, followed Great Britain into two world wars and various non-military treaties and did not ratify the Statute of Westminster of 1931, which gave the self-governing countries of

the British Commonwealth power to run their own external affairs, until 1942.

After the end of the Second World War in 1945 the movement towards greater independence for Australia made steady progress. Australians ceased to be British subjects and became Australian citizens with the passing of the Australian Nationality and Citizenship Act in 1948. From 1964 Australians travelled overseas using Australian rather than British passports. With the entry of Great Britain into the European Economic Community in 1966, Australia had to diversify its markets and looked more to the Middle East and the Asian-Pacific region. The growth of a distinctively Australian film industry and other developments in the arts, including the opening of the icon of the Australian landscape, the Sydney Opera House in 1973, all helped to move Australia to being a self-consciously independent nation.

Constitutionally the suspension of appeals to the Privy Council in two stages in 1968 and 1975 and affirmation of the High Court as the highest court in the Australian federal legal system and the passage of the Australia Act in 1986 confirmed this process. Some would argue that the final step would be the proclamation of an Australian republic.

Unlike another country formed from British colonies—the United States of America—Australia has been spared the drama of a War of Independence and a civil war. Some argue that as a result there is a weaker degree of national consciousness. Anzac Day is our cultural equivalent, and it is regarded by many as the birth of the Australian Nation. However, it does not satisfy others, for Australians were fighting as part of the British Empire, in campaigns decided by the British Government and under the generalship of British officers.

Background document 1

The Australian Constitution refers to the Governor General in many clauses and it gives that person a pre-eminent position in the Australian federal political system. Section 61 states: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." Although this, and many other clauses of the Constitution give the Governor General specific and considerable powers, the incumbent also has reserve powers which rely on constitutional tradition and relate to situations like deadlocks between or even within Houses of Parliament.

It was these reserve powers which the then Governor-General, Sir John Kerr, acted on when he dismissed Gough Whitlam on 11th November 1975. Immediately afterwards he appointed Malcolm Fraser as Caretaker Prime Minister and then dissolved both Houses of Parliament.

He sought advice privately from, amongst others, Sir Garfield Barwick, Chief Justice of the High Court (1964–1981), member of the Privy Council and previously a Liberal Party Minister for External Affairs, but he sought that opinion from him as a legal colleague and not as reflecting the position of the High Court. Many would argue that these reserve powers are not explicit and are the subject of interpretation and they should be codified in the Constitution. Some constitutional lawyers argue they should not, and even cannot, be codified, as deadlock situations cannot be predicted. Others say they can be, or that such important powers should not be in the hands of a single person, especially as they may not be trained in constitutional law.

Background document 2

An Australian as Head of State?

The Australian Republican Movement, the largest republican group, has used this slogan. Clearly a British monarch is not an Australian, so if this aim was achieved, then Australia would have to become a republic. The fact that Australians have been Governors-General since 1965 has complicated this argument.

Some arguments against this proposal are as follows:

- the current arrangement recognises Australia's historical links to Great Britain
- a Head of State who is visibly independent of the Australian political system is a guarantee against political extremism, even dictatorship, in Australia
- it would be costly to change the Constitution
- that the current system has worked well since its inception and therefore should not be changed
- that the Governor-General is, in fact, the Australian Head of State, although the Australian Constitution does not say so.

Some arguments in favour of this proposal are as follows:

- as the Australian Head of State is Queen Elizabeth II of Great Britain, and the position will pass to her successors, no Australian can ever become Australia's Head of State
- that although the Queen of Great Britain is also Queen of Australia, she only performs that function when in Australia or Great Britain and does not represent

Australia when travelling in other countries as she is also the Head of State of Great Britain. This compromises her ability to be an advocate of Australian interests, especially if they compete with British interests:

- that Australia is in effect an independent country with an anachronistic Constitution which needs to be changed to have an Australian as its Head of State
- that the change would not mean leaving the Commonwealth of Nations, as many members are republics (eg India and South Africa) or not competing in the Commonwealth Games
- there would be no need to consider change to either the Australian flag or national anthem to achieve an Australian Head of State
- there would be no need to make major changes to the Constitution as the Australian Head of State could have the same powers as the Governor-General holds under the current arrangements
- that Great Britain is now geographically and formally part of Europe through the European Union and Australia is part of the Asia-Pacific region.

Can you add to these lists?

Background document 3

Case study—The Dismissal of a Premier, New South Wales, 1932

The 1920s and 1930s were turbulent times in Australia's history. The end of the First World War in 1918 was followed by the repatriation of many Australian troops from the battlefields of Europe and the Middle East where they had built, at the high cost of 60,000 dead, a reputation for toughness and reliability. But they also returned to a country which not only glorified them, but looked forward to social reforms which the four years of war had interrupted.

In New South Wales the first Labor government of John Thomas (Jack) Lang (1876–1975) from 1925–7 governed in that manner. Lang, a watchmaker's son born in Central Sydney, who started selling newspapers when he was seven, entered night school at 17, established an auctioneer and real estate business in Auburn when he was 20. He was elected to the NSW Parliament in 1913, was State Treasurer from 1920–22 and was elected leader of the New South Wales Labor Party in 1923.

His first government restored the 44 hour week, abolished fees for secondary schools, introduced child endowment and widows' pensions twenty years before the Commonwealth acted in this area following the 1946 referendum, liberalised workers' compensation, established the NSW Industrial Commission and Government Insurance Office and instituted universal suffrage in local government elections. It was one of the great reforming governments in Australia's history. (See Australian Encyclopaedia vol. 6 pp.59–60). Before Lang's return to the Premiership of NSW in 1930 a new player had entered the stage of NSW politics.

King George V (1865–1936) had selected Sir Philip Woolcott Game CB KCB GBE to be Lieutenant Governor of New South Wales. Of course, this appointment had been made under the state Constitution of New South Wales, but the powers and responsibilities of the states' Governors with respect to their state government were the same as the Australian Governors-General to the Commonwealth Government. Of course, these included the 'reserve' or 'prerogative' powers of the Crown.

Game was a man of the British Empire. He received his education at Charterhouse, a private school, and the Royal Academy, Woolwich, from which he was commissioned as an officer in the Royal Artillery in 1895. He served in the British Army in South Africa in 1901 and in France during the First World War being mentioned in dispatches on both occasions and receiving DSO in 1915. He became Chief of Staff of the Royal Flying Corps from 1916 and commander of the Royal Air Force in India from 1922–23. He was appointed Governor of New South Wales in 1930 and held the post until 1935.

At the time of his arrival economic depression had affected the Australian economy. Unemployment had soared, governments were in shock and no solutions were clear. Lang's Premiership was contentious.

Lang had convinced Game to support his plan to abolish the Legislative Council of New South Wales following Queensland's lead of 1921. The legislation to carry this into effect had not been passed when in February 1931 Lang announced his plan to

Background document 3

deal with the state's financial problems. This plan centred on withholding interest on British loans and reducing interest payments on domestic loans. On 13 May 1932 Game dismissed Lang and his Cabinet after they refused to pay the Commonwealth National Party government, led by Prime Minister Joseph Lyons, money it claimed. Lang, of course, had the confidence of the Lower House, the House of Assembly of New South Wales, so many felt that Game had exceeded his prerogative powers by dismissing Lang. However, at an election held a week later Lang and his party were defeated.

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Background document 4

Heads of State and Heads of Government

James Hacker, the television series Minister has been briefed by his private secretary Bernard Wooley and departmental head Sir Humphrey Appleby on the impending visit of the President of Buranda and the need for the Queen to travel from Balmoral Castle in Scotland to London to meet him, Hacker goes on:

This surprised me. I'd always thought that State Visits were arranged years in advance. I said so.

'This is not a State Visit,' said Sir Humphrey. 'It is a Head of Government visit.'

I asked if the President of Buranda isn't the Head of State? Sir Humphrey said that indeed he was, but he was also the Head of Government.

I said that if he's merely coming as Head of Government, I didn't see why the Queen had to greet him. Humphrey said that it was because she is the Head of State. I couldn't see the logic. Humphrey said that the Head of State must greet a Head of State, even if the visiting Head of State is not here as a Head of State but only as Head of Government.

Then Bernard decided to explain. 'It's all a matter of hats,' he said.

'Hats? I was becoming even more confused.

'Yes.' said Bernard, 'he's coming here wearing his Head of Government hat. He is the Head of State too, but it's not a state visit because he's not wearing his Head of State hat, but protocol demands that even though he is wearing his Head of Government hat, he must still be met by... .' I could see his desperate attempt to avoid mixing metaphors or abandoning his elaborately constructed simile 'the crown', he finished in triumph.

From Anthony Jay (1983) 'Yes Minister. Diary of James Hacker MP'. BBC. London

Background document 5

Notes on the history of Australian Republicanism

The republican debate was imported into the newly founded British colony of New South Wales by Irish convicts who had fought against the British in Ireland. Some saw the Castle Hill convict uprising as the first republican outburst in Australia, but the uprising was suppressed and there was no other violent anti-government protest until the Eureka uprising by the miners of Ballarat, Victoria in 1854.

In the meantime the republican movement had gained some respectability with the work of John Dunmore Lang and the establishment of the republican Australia League. His book *Freedom and Independence for the Golden Lands of Australia*, published in 1848 argued, rather than fought for, an independent Australian republic.

The attempt by Henry James O'Farrell to assassinate the second son of Queen Victoria, Prince Albert, Duke of Edinburgh at Clontarf in Sydney on the 12th March 1868, attracted more attention to the republican cause in the Australian colonies, but its obvious connection with the continuing problems of the British occupation of Ireland did little to elevate the cause of republicanism amongst non-Irish Australians and indeed led to a surge of imperial loyalty.

From the 1880s newspapers like *The Bulletin*, *The Worker* and *The Boomerang* all supported the republican cause and Henry Lawson's poetry called for the 'Republic of the South'.

In 1887 the Republican Union was founded in Sydney by George Black, a veteran of Eureka and in 1888 the Republican League was formed. In the same period the

Australian Secular Association (which has evolved in to the Australian Rationalist Society) was promoting atheism, republicanism, birth control, secular education and law reform to all who would listen. There seemed a chance that Australia would not only become a republic, but a federal republic. But the colonial politicians were not republicans and the movement itself was a minority activity although the Republican Union was represented at the Bathurst Federation Convention in 1896.

The public debate largely dissolved until 1959 when the Australian Republican Party was founded in Melbourne after the 1956 Olympics, when some people reacted to the playing of God Save the Queen when Australians were being awarded their medals.

More significantly, the publication in the 1960s of Geoffrey Dutton's book *Australia and the Monarchy* and Donald Horne's *The Lucky Country* rekindled a debate which has continued to now. Horne said,... "to some Australians of 50 years ago... the radical position then was to be anti-British to develop an Australia nationalism and to dream of an independent Australian republic".

The political events of the 1975 dismissal of Prime Minister Gough Whitlam by Sir John Kerr put the republican debate into concrete terms and led to detailed examination of the Constitution. In the 1980s the Constitutional Commission recommended a number of changes although stopping short of calling for a republic.

From 1991, with the formation of the Australian Republican Movement in Sydney

Background document 5

and the work of author Tom Keneally—especially his book *Our Republic* published in 1993 the republican movement gained strength. With the appointment of a Republican Advisory committee (to be chaired by Malcolm Turnbull) by the then Prime Minister Paul Keating, and his announcement of his support for its recommendations in June 1995 that Australia become a republic by 2001, the republican movement had reached a level of recognition and popular support that made it a major player in Australian politics. The issue had to be addressed at national level.

This was done at the 1998 Constitutional Convention. At the time of the elections for the elected delegates to the convention, in 1997, a wider variety of republican opinion began to emerge. Although the Australian Republican Movement polled 30% of the vote and elected the largest number of delegates other republicans were elected including a number who were committed to popular election of the president. While they were in a minority at the convention they were buoyed by public opinion polls that showed that a majority of republican Australians wanted to directly elect the president.

From then until the November 1999 referendum republicans were divided between those who supported a president chosen by the parliament and those who preferred a president chosen directly by the people. During the campaign, the latter group, led by Ted Mack and Clem Jones campaigned for a NO vote. Ultimately republican disunity meant defeat.

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Background document 6

Dismissal of a Prime Minister, Commonwealth of Australia, 1975

The most recent constitutional crisis occurred in Australia on 11th November 1975. On that day the Governor-General, Sir John Kerr, dismissed the Prime Minister, Gough Whitlam, and installed Malcolm Fraser in his place as Caretaker Prime Minister. At the same time the Governor-General called an election for 13th December 1975. At that election the Coalition government led by Fraser was elected with a resounding majority.

These events were an important background to discussions of an Australian republic in the 1990s and, in various ways, they played a part in the Constitutional Convention debates and the Republic Referendum campaign. The dismissal of the Prime Minister raised the question of the powers of the Governor-General (see Background Document 1) and the relationship between the Governor-General and the Prime Minister. In a general way these events are the background to the discussion of the codification of the powers of the president in a republic. In the particular case of the 1999 referendum they informed debate about the procedure for dismissing the president embodied in the legislation.

The 1975 crisis was the culmination of the three years in office of the Whitlam Labor government elected on 2nd December 1972. They were turbulent years as a reform party, out of office for 23 years, attempted to institute a wide range of changes quickly. The focus of the tension lay in the relationship between the government, with a majority in the House of Representatives, and the Senate majority controlled by the

opposition. In May 1974 the government held an early double dissolution election in order to pass bills held up in the Senate and, if possible, to gain control of the Senate. In the quest for the former it was successful at a joint sitting of the two houses, but in the latter unsuccessful at the election. After the election numbers were equal in the Senate so that both the government and the opposition lacked the necessary majority to pass legislation.

By the time of the governments budget in August 1975 the government had lost its power to pass its legislation and the Opposition had gained the numbers to block Supply. Two Labor senators had departed, one through death and the other, Lionel Murphy, through elevation to the High Court. In both cases non-Labor State governments had refused to appoint Labor senators to replace the two departures.

The Opposition, now led by Malcolm Fraser, who had replaced the former Liberal leader, Billy Snedden, in May 1975, refused to allow the supply bills to pass through the Senate. The Prime Minister advised the Governor-General that the principle of responsible government meant that he should act only on the advice of his Prime Minister. The Opposition leader declared that the federal principle meant that the government was responsible to both houses of parliament not just the House of Representatives. As the government could not guarantee supply it should resign.

Eventually the Prime Minister advised the Governor-General to dissolve the Senate and call a half-senate election in order to resolve

Background document 6

the crisis. Instead Sir John Kerr chose to dismiss the Prime Minister. The Queen was not involved in this decision and, when asked to intervene by the Speaker of the House of Representatives, declined to do so.

The constitutional issues at the heart of the 1975 crisis, such as the relationship between the two houses of the parliament, the method of filling casual Senate vacancies and the powers of the Governor-General, have been considered in subsequent attempts at constitutional reform. Both the Constitutional Convention in the later 1970s and the Constitutional Commission in the 1980s did so. Only the question of filling casual Senate vacancies was resolved, by a referendum in 1977.

The other two issues remain. Senate reform has been particularly alive, because of the continuing inability of the government party to gain the majority in the Senate. Resolution by reducing the powers of the Senate remains unlikely. In the 1999 referendum campaign attention was drawn to the position of the Senate because the model gave it no role in the dismissal of a president (while having an equal role in the appointment process). This anomaly weakened the YES case because it failed to satisfy those who worried about a weakening of the Senate's role and a consequent increase in the powers of the Prime Minister.

The powers of the Governor-General were to be transferred to the president in the 1999 republican constitution. In the minds of some critics this was vague and unsatisfactory. Supporters of the model could see no problem with this idea. But

codification of the powers of the president was attractive to others, especially if a future president was to be directly elected.

The events of 1975 were also featured during the campaign because the YES case chose to feature the main protagonists Prime Minister Gough Whitlam and Opposition Leader Malcolm Fraser in its media campaign. Their support of the YES case was meant to address specifically the stability of the new system and its ability to stand the strain of a constitutional crisis. It also was portrayed as an example of bipartisan support for the republic. Although this intervention was widely criticised in subsequent commentary, because by using two former politicians it played into the hands of the NO case, it was an echo of 1975 in 1999.

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Background document 7

The Constitutional Preamble

Preamble defeated at the 1999 Referendum

With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.

We the Australian people commit ourselves to this Constitution:

- Proud that our national unity has been forged by Australians from many ancestries;
- Never forgetting the sacrifices of all who defended our country and our liberty in time of war;
- Upholding freedom, tolerance, individual dignity and the rule of law;
- Honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;
- Recognising the nation-building contribution of generations of immigrants; mindful of our responsibility to protect our unique natural environment;
- Supportive of achievement as well as equality of opportunity for all;
- And valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Discussion:

Why does Australia need a new constitutional preamble?

How should one be drafted?

What do you think of the proposed 1999 preamble?

What would you like to see included in a new constitutional preamble?

The critics of this preamble were concerned about both the process by which it was written and its substance. It was written quickly with much less public discussion than had been the case for the republic question. It was very much the Prime Minister's Preamble. There was also unresolved dispute about a number of aspects, including recognition of Aboriginal and Torres Strait Islanders, the rights of women and the reference to God. Some also saw the second referendum question as a distraction from the main issue, although others saw it as a potentially more interesting question.

The new preamble grew out of a resolution of the Constitutional Convention. Early in 1999 the idea was taken up by the Prime Minister who, together with the poet, Les Murray, prepared a draft. With some amendments this draft was released for public consultation in March 1999. Reaction was mixed and the Opposition parties were opposed to it. But eventually Prime Minister Howard won the support of the Australian Democrats through involving Senator-elect Aden Ridgway in the drafting of the words about Aboriginal and Torres Strait Islanders.

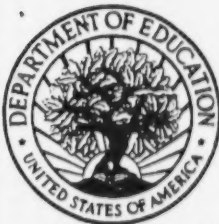
Background document 7

The proposed preamble was then passed by both Houses of Parliament.

Very little campaigning was devoted to this question beyond the official Yes and No cases. Late in the campaign John Howard and Aden Ridgeway attempted to focus community attention on the issue without success. The question was defeated by 61% to 39%. No state or territory voted YES.

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